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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

IN RE: ALIEN CHILDREN
EDUCATION LITIGATION

STATE OF TEXAS AND
TEXAS EDUCATION AGENCY
Appellants

VS.

UNITED STATES
Intervenor-Appellee

AND

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN
Appellees

On Appeal From The United States Court Of
Appeals For The Fifth Circuit

JURISDICTIONAL STATEMENT

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State and County Affairs

RICHARD ARNETT
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512/475-3131

Attorneys for Appellants

QUESTIONS PRESENTED

1. Whether aliens unlawfully present in the Uni States are "persons within a state's jurisdiction" that phrase is used in the equal protection clause of Fourteenth Amendment.

2. Whether a state is obligated to provide a tuiti free public education to children unlawfully present the United States.

PARTIES

The parties are the same as in the court below.

SUBJECT INDEX

Questions Presented .....

Parties .....

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42 C.F.R. §405.205(b) .....

45 C.F.R. §233.50 .....

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Texas Education Code, Section 21.031(a)-(c) ...

U.S.CONST.
Tenth Amendment .....

Fourteenth Amendment .....

NO._____

IN THE
SUPREME COURT OF THE UI
OCTOBER TERM,

IN RE: ALIEN CHIL
EDUCATION LITIGA

STATE OF TEXAS
TEXAS EDUCATION A

VS.

UNITED STATE

AND

CERTAIN NAMED AND U
UNDOCUMENTED ALIEN

On Appeal From The United S
Appeals For The Fifth

JURISDICTIONAL STA

TO THE HONORABLE JUDGES

NOW COME the State of Texas ar
tion Agency, by and through their
Richard Arnett, Assistant Attorney
and file their jurisdictional staten
captioned cause.

JURISDICT

On July 21, 1980, the United S
the Southern District of Tex
issued its memorandum opinion
declaring unconstitutional Sect
Texas Education Code and enjo
said statute. The district court'
upon 28 U.S.C. §1343(3) and (
U.S.C. §2000d and the opinion
Multidistrict Litigation en
1979. 482 F.Supp. 326 (Judicia
Litigation 1979). The matter
United States Court of Appeals
80-1807, which Honorable Court
district court on February 23,
was filed in the Court of Appea

This Court has jurisdiction
§1254(2).

STATUTORY PI

TEX.EDUC.CODE §21.03

(a) All children who are ci
States or legally admitted
over the age of five years
21 years on the first day
scholastic year shall be en
of the Available School Fu

(b) Every child in this sta
the United States or a le
and who is over the age
over the age of 21 years
September of the year in
sought shall be permitted
free schools of the district

in which his parent, gu
having lawful control of
he applies for admission.

(c) The board of truste
school district of this sta
public free schools of the
all persons who are eithe
States or legally admitt
over five and not over
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or his parent, guardian o
control resides within th

The Fourteenth Amendm
Constitution provides in par
All persons born or nat
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are citizens of the Uni
State wherein they resid
or enforce any law wh
privileges or immuniti
United States; nor shall
person of life, liberty, o
process of law; nor den
its jurisdiction the equa

STATEMEN

Pursuant to the order in *I*
tion Litigation, 482 F.Sup
Multidistrict Litigation 197
tion of common questions
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tions essentially involve the
21.031 of the Texas Educat
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Following the interv
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the Texas Education Co
clause of the Fourteen
States Constitution
thereof. These allegatic
the Declaratory Judgm
2202, 42 U.S.C. §198
district court issued its
1980, holding that Sect
equal protection clause
and enjoining its applic
state funding for the ed
of their status unde
law." The opinion of th
F.Supp. 544 (S.D.Tex.

Appellants filed notic
peals for the Fifth Circu
stay from the district
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Circuit Court of Appe
Mr. Justice Powell on S
(1980), 101 S.Ct. 12 (19

The Court of Appeals
affirmed the district cou
of appeal was filed by A
amended notice of app
March 13, 1981.

Another case involvi
questions has been do
80-1538, *Plyler v. Doe.*
case are reported at 4
and 628 F.2d 448 (5th
that the instant case be

It is difficult to imagi
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equal protection clause
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Justice Powell on the
herein. 101 S.Ct. 12 (19
comes to the Court on a
which both sides presen
support their positions.

The ramifications of t
cause and *Plyler v. Doe*
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and Aid to Families Wit
§233.50. The latter regu
to the Blind, Aid to Per
and Supplemental S
42 U.S.C. §1382c(a)(1)(B)
the entitlement of undoc
U.S.C. §1395i-2, 42 C.F
U.S.C. §1395o, 42 C.F.
some circumstances, soc
§426a(a)(4). While the
regulations is not an issu
the applicability of the
documented aliens will c
states to implement fede
power of the federal ag
Karst, *The Fifth Amend*
tection, 55 N.C.L.Rev. 54
of the federal statutory
Mathews v. Diaz, 426 U.
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The application
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> Judiciary. . .

[1]Indeed, the decis
counter to federal int
migration. *See, Prel*
legal Aliens, pp. 40, 4
0-241-089/1020 (reco
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Any rule of
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Mathews v. Diaz
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Diaz, supra, at 8
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[2]The scope of fede
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[3]*De Canas v. Bica,*
357 U.S. 185 (1957);
rafato v. United Stat
1975), *cert. den.*, 424
479 F.Supp. 519 (D.
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[4]Various e
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an issue striking at the heart of the American system of federalism.

The differentiation between permissible state and federal interests expressed in *Mathews v. Diaz, supra,* and *Nyquist v. Mauclet,* 432 U.S. 1 (1977), is not applicable to aliens whose presence is not authorized by federal law. The source of the exclusive federal power to control immigration being implied, *The Chinese Exclusion Case,* 130 U.S. 581, 604 (1889), that power cannot be construed to justify the assertion of interests by the federal government where those interests are denied to states unless the assertion of such interests by a state conflicts with the "determination to admit [an] alien ...." *Foley v. Connelie, supra,* at 295; U.S.CONST., Tenth Amendment. Thus, in the context of illegal or undocumented aliens, the various states are entitled to assert the same self-protective interests which this Court has allowed to the federal government.

Finally, the appeal presents the question of whether education is a fundamental right, the deprivation of which must be supported by compelling state interests. The district court held in the affirmative in this regard. 501 F.Supp. at 564. *But see, Ambach v. Norwick,* 441 U.S. 68, 77, n.7 (1979). This Court is thus presented with the sequel to *San Antonio School District v. Rodriguez,* 411 U.S. 1 (1973).

The injunction issued by the district court constituted an abuse of its discretion. Undocumented or illegal aliens are not "persons within a state's jurisdiction" under the Fourteenth Amendment. Assuming otherwise *arguendo,* the state has articulated sufficient basis to support the statute. *Dandridge v. Williams,* 397 U.S. 471 (1970). Accordingly, Section 21.031 of the Texas Education Code does not violate the United States Constitution, and its application may not be enjoined.

Further elaboration is unnecessary to demonstrate the importance and breadth of the issues presented by this appeal. The issues go beyond the relationship of the various states to persons whose presence within

such states is illegal; they involve the basic structure
federal constitutional power and responsibility. T
issues are of major constitutional significance and wa
rant review by this Court.

Respectfully submitted,

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Attorneys for Appellants

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On Appeal From The United States Court O
Appeals For The Fifth Circuit

APPENDIX TO THE JURISDICTIONAL STATEMENT

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Attorneys for Appellants

SUBJECT INDEX

Opinion of Mr. Justice Powell on Application To Vacate Stay .....

Order of Court of Appeals for the Fifth Circuit .....

Notice of Appeal .....

Amended Notice of Appeal .....

Order of District Court .....

Opinion of District Court .....

SUPREME COURT OF THE UNITED

No. A-179

Certain Named and Unnamed Noncitizen Children and Their Parents, Applicants v. State of Texas, *et al.*	* * * * * *	On Applic Vacate

[September 4, 1980]

Mr. Justice Powell, Circuit Justice.

This is an application to vacate an ord States Court of Appeals for the Fifth Cir pending appeal an injunction entered by States District Court for the Southern Texas. The District Court held that § 2 Texas Education Code, which prohibits th funds to educate alien children who are no mitted" to the United States, violates the l tion Clause of the Fourteenth Amendment enjoined state education officials from public education to any child, otherwise el the child's immigration status. The Di denied the State of Texas's motion to sta tion, because the Court found that a substantially harm the plaintiffs and would public interest." The Court of Appeals, quent motion of the State, stayed the in ding appeal without opinion.

[1]Another Federal District Court in Texas had prev § 21.031 violates the Equal Protection Clause as app Independent School District. *Doe v. Plyler*, 458 F Tex. 1978), *appeal pending*, No. 78-3311 (CA5).

Plaintiffs below, and applicants school-age, "undocumented" alien been denied a free public education 21.031, and their parents.[2] Preci number of children in Texas e description is impossible. The S there are 120,000 such children, b rejected this figure as "untenable' modest estimate of 20,000 c documented children have not bee the United States through establ migration. None, however, is pre deportation proceedings, and mar found, are not deportable under laws. The District Court conclude jority of the undocumented chil become permanent residents of thi

This case came before the Distri a consolidation, by the Judicial P Litigation, of lawsuits filed in all f in Texas against the State and st challenging the validity of § 21.03 a similar statute. The Court foun tively denied an education children. Although they could att ment of tuition, the Court further ment is beyond the means of their the Equal Protection Clause a residing in the United States, aliens. It recognized that no pre directly supports this ruling, an analogous rulings of this Court, *Diaz*, 426 U.S. 67, 77, (1976)(Due P to aliens unlawfully residing in th precedents in lower courts, *see* F.2d 1023, 1025 (CA2 1975) (dict

[2]The United States intervened on the has filed here a statement in support of t stay.

Court found guidance in the languag
tection Clause, which extends prot
within a State's jurisdiction, and rul
which purports to act on any person
State is subject to scrutiny under the

The District Court then determin
statute was subject to strict scruti
paired a fundamental right of access
education. It sought to distinguish *S*
Board v. Rodriguez, 411 U.S. 1 (197
the Constitution does not protect a
at least beyond training in the basic
the exercise of other fundamental rig
and free expression. *Id.*, at 29-39. T
that § 21.031 established a complete
tion for the plaintiff children, and th
tion reserved in *Rodriguez* of whetl
damental right under the Constit
education. It stressed that an affi
this question would not involve the
overseeing the quality of educatio
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plying strict scrutiny, the court
violative of the Equal Protection Cla
not justified by a compelling state i
explicitly so holding, the court also in
hold the statute unconstitutional ev
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substantially related to an important

II

"The power of a Circuit Justice to
well settled." *New York v. Kleppe*, 4
(1976) (Marshall, J., in chambers). Se
83 S.Ct. 10, 9 L. Ed. 2d 43 (19
chambers). The well-established prin
Circuit Justice in considering an ap
judgment entered below are equall
considering an application to vacate

"[T]here must be a rea
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Times-Picayune Publishing
U.S. 1301, 1305 (1974) (Po
an application to vacate a
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Respect for the judgment
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Circuit Justice should not
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615, 616 (1960) (Harlan, J.
supporting this reluctance
are plain: when a court of
the merits of a controversy
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the case will eventually
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Court's holding that the Eq
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stitutional significance. It al
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terms, the case presents a ch
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residents. The decision of th
resolve satisfactorily the imm
overarching question of the
Protection Clause to unlawful
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It is more difficult to say wh
probability that a majority of
agree with the District Cour
Diaz, supra, upheld the pow
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the provision of Medicare be
the classification violated the
Court's resolution of the cas
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The State does not
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vacated. The primary
Agency is to provide
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Board v. Rodriguez,
the State allege that i
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[3]The State argues that s
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IN RE:
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Appeal from

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[Filed Feb. 23

NO 80-1807

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: ALIEN CHILDREN
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STATE OF TEXAS AND
TEXAS EDUCATION AGENCY
Defendant-Appellants

VS.

UNITED STATES
Plaintiff-Intervenor-Appellee
AND

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN
Plaintiffs-Appellees

NOTICE OF APPEAL[1]

TO THE HONORABLE COURT OF APPEALS:

Notice is hereby given that the State of Texas and Texas Education Agency by and through their attorney, Richard Arnett, Assistant Attorney General, file this their Notice of Appeal from the judgment of the United States Court of Appeals for the Fifth Circuit entered February 23, 1981, which judgments summarily affirmed the District Court judgment in this cause which held Section 21.031 (a) - (c) of the Texas Education Code unconstitutional.

---

[1]Filed March 2, 1981.

Respectfully submitted,

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BAR NO. 01333300

Attorneys For Defendants-Appellants

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AC 512 - 475-3131

CERTIFICATE OF SERVICE

I, Richard Arnett, Assistant Attorney General of Texas, do hereby certify that a true and correct copy of the foregoing Notice of Appeal has been served upon all parties by placing same in the United States mail, certified, return receipt requested, addressed to Mr. Antonio Guajardo, Centro Para Inmigrantes de Houston, Inc., 2314 Cochran St., 2nd Floor, Houston, TX 77009;

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Assistant Attorney Ge

NO 80-1807

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: ALIEN CHILDREN
EDUCATION LITIGATION

STATE OF TEXAS AND
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Defendant-Appell

VS.

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AND

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UNDOCUMENTED ALIEN CHILDREN
Plaintiffs-Appe

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF TEXAS, HOUSTON DIVISION

AMENDED NOTICE OF APPEAL[1]

---

[1]Filed March 13, 1981.

TO THE HONORABLE COURT OF A

Notice is hereby given that the Stat
Texas Education Agency, by and th
torney, Richard Arnett, Assistant At
pursuant to 28 U.S.C. 1254(2), file this
Appeal to the United States Supreme
judgment of the United States Court of
Fifth Circuit entered February 23, 198
ment summarily affirmed the district co
this cause holding Section 21.031(a)-(c
Education Code unconstitutional.

Respectfully s

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CERTIFICATE OF SERVICE

I, Richard Arnett, Assistant Attorney
Texas, do hereby certify that a true and co
the foregoing Amended Notice of Appeal h
ed upon all parties by placing same in the U
Mail, certified, return receipt requested, ad

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UNITED STATES DISTRI
SOUTHERN DISTRICT
HOUSTON DIVIS

IN RE	§
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ALIEN CHILDREN	§
	§
EDUCATION	§
LITIGATION	§

ORDER

In accordance with the Memor
entered this date, the court hereby

The plaintiffs' request for a decl
GRANTED. Section 21.031(a)-(c) o
tion Code violates the equal prote
fourteenth amendment to the Unit
tion.

IT IS FURTHER ORDERED
sioner of Education, his employees,
assigns and all those acting in con
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Available School Fund to any child
age of five years and under the ag
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IT IS FURTHER ORDERED
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district in which they reside on acc
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IT IS FURTHER ORDERED
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The Clerk shall file t
counsel for all parties wit

DONE at Houston, Te
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UNITED STATES DISTRICT
SOUTHERN DISTRICT OF T
HOUSTON DIVISION

IN RE	§
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ALIEN CHILDREN	§
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EDUCATION LITIGATION	§

I. INTRODU

This case concerns what has e
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children.

Children are the basic resour
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On January 11, 198
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Plyler demonstrate that the *Plyler* case involved only the constitutionality of section 21.031 as applied by the Tyler Independent School District.[9] After the court entered its judgment in *Plyler*, the State moved to reopen the case to present additional evidence.[10] Judge Justice, in denying the State's motion, stated that there was no need to re-open the case since "the amended complaint does not state a cause of action against any school district other than the Tyler Independent School District and since this court intends to order relief only against the Tyler Independent School District. . . ." *Doe v. Plyler*, No. TY-77-261-CA (E.D. Tex. Sep. 14, 1978). While it is true that the State offered some evidence in *Plyler* that related to the state-wide impact of the statute, the court's order in *Plyler* did not decide that issue. Much emphasis was placed on the small number of undocumented children in the Tyler Independent School District. *Plyler*, *supra*, at 573, 577 & 590. The issue in this multidistrict litigation is much broader. Although the two cases share a common inquiry, the issue considered in *Plyler* is not identical to that considered in this case.

In addition, even if the issue of the state-wide constitutionality of the statute was decided in *Plyler*, it was neither necessary nor essential to the resulting judgment. The *Plyler* court was not asked to hold the statute unconstitutional throughout the state. It could have granted all of the relief sought without even considering the issue of the facial constitutionality of the statute.

Finally, application of offensive collateral estoppel would be unfair to the State. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 n.14 (1979), the Supreme Court noted that "[a]llowing offensive collateral estoppel . . . may be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." The State previously had defended successfully the constitutionality of the statute in the state courts. *Hernandez v. Houston Independent School District*, 558 S.W.2d 121 (Tex.Civ.App.-Austin 1977, writ ref'd n.r.e.). That judgment is not binding on the plaintiffs

here; they are not the privies of the state court plaintiffs. It would be unfair to allow the plaintiffs, but not the State, to use offensive collateral estoppel in reliance on the one previous judgment in their favor. Accordingly, the plaintiffs' motion for partial summary judgment must be denied.

3. Motion to Proceed as a Class Action.

The plaintiffs seek to maintain this suit as a class action. Initially, the court was reluctant to grant the plaintiffs' motion.[11] These consolidated actions were filed in several districts. Questions about the effect of a particular school district's policy may not be typical of those questions pertaining to the other school districts. Further, the court did not want to postpone the hearing on the merits to take up the class question.

Having heard the evidence, the court concludes that this action should proceed as a class action with respect to the issue litigated in this consolidated proceeding. The transferor courts should consider separately whether the plaintiffs' claims against the various school districts for damages should be maintained as class claims.

It is clear that the class proposed is so numerous that joinder is impractical. Both the sheer numbers and the difficulty of locating class members prevent joinder. Whether section 21.031 is constitutional is a question of law which is common to the class and the claims of the representative parties are typical of the caims of the class. The representative parties, Elvia Mendoza, Miguel Mendoza, Javier Mendoza, and Jorge Mendoza, and their counsel, have represented the class adequately and fairly and the court believes they will continue to do so. Accordingly, the class representatives satisfy the requirements of Rule 23(a). In addition, the court finds that the State has acted on grounds generally applicable to the class and concludes that final injunctive relief is appropriate with respect to the class as a whole. Rule 23(b)(2).[12] The class is defined as all children who are over five and not over 21 years of age at the beginning of the scholastic year and have been or will be denied admission to the public

schools in the State of Texas on a tuition-free basis becau
the alienage provisions of section 21.031 of the Texas E
tion Code.

C. THE CHALLENGED STATUTE

Prior to September 1, 1975, the Texas Education C
provided that all children between six and 21 years o
were entitled to attend the public schools of the di
where they resided. Funds were provided to the schoo
tricts by the State in proportion to the school district's
age daily attendance. All children were counted in th
culation of average daily attendance provided they sa
the age and residency requirements.[14]

In April, 1975, the Attorney General of Texas, upon
quest made by the Commissioner of Education, issu
opinion holding that *all* children within the State wer
titled to attend public schools in the district of their resi
regardless of whether they were legally or illegally
the United States.[15] Prior to the Attorney General's Op
there had been no established policy regarding the adm
of undocumented children to the public schools. A small
ber of school districts excluded undocumented childr
that time.[16]

In May, 1975, the Texas Legislature amended the
Education Code. The amended statute, Tex. Educ. Code
tit. 2, § 21.031. provides in pertinent part:

> (a) All children who are citizens of the Unite
> States or legally admitted aliens and who are ove
> the age of five years and under the age of 21 year
> on the first day of September of any scholastic yea
> shall be entitled to the benefits of the Availabl
> School Fund for that year.
>
> (b) Every child in this state who is a citizen of th
> United States or a legally admitted alien and who
> over the age of five years and not over the age of 2
> years on the first day of September of the year
> which admission is sought shall be permitted to a
> tend the public free schools of the district in whic

> he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.
>
> (c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian or person having lawful control resides within the school district.

Accordingly, undocumented children are not entitled to tend public school and they may not be counted when culating the average daily attendance which determines school district's share of the Available School Fund. L school districts are given the discretion to deny admissio to permit attendance upon payment of tuition.

Needless to say, the effect of the new statute is to excl undocumented children from the Texas public schools.. though some school districts continue to educate all childr the majority exclude them or require tuition.[17] There wa evidence that any undocumented children are presently tending school upon payment of tuition.[18]

An evaluation of the statute properly may not proceed the assumption that the statute operates only to prohibit use of state funds to educate undocumented children. statute makes a distinction which treats undocumented c dren differently from all other children with respect to mission to the public schools. Section 21.031(b) & (c). As court has noted above, the effect of the amendment i exclude undocumented children from school. Even tho some school districts have opted to admit undocumented c dren, the State's financing scheme penalizes them for that cision; they receive less money per pupil from the State t school districts which exclude undocumented children. F ther, the statute was amended by the Legislature imm ately after the Attorney General informed the Commissio

of Education that undocumented children were attend public schools. It is reasonable to conclu amendment was a response to the Attorney Ge ion.[19] Several school districts which previously children now use the amendment as authorizatio undocumented children. Accordingly, it would to view this case as one involving only state fisc the method of financing the schools in Texas.

II. THE EQUAL PROTECTION CLA

Section one of the fourteenth amendment of States Constitution states in pertinent part: "N . . . deny to any person within its jurisdiction th tection of the laws." This provision, "unlike othe of the Constitution, confers no substantive rights no substantive liberties. The function of the equ clause, rather, is simply to measure the validity *tions* created by state laws." *San Antonio Ind. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., (footnote omitted). The equal protection clause legislative classifications are fair and that simil stanced persons are treated alike. States have tion in making classifications unless the classifica on a suspect criterion or unless the classification damental right or interest. *See Frontiero v. Ric* U.S. 677 (1973); *Shapiro v. Thompson*, 394 U.S *Harper v. Virginia Board of Elections*, 383 U.S *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Maryland*, 366 U.S. 420 (1961); *Chatham v.* F.2d 73 (5th Cir. 1980). *See generally* Gunther, Court, 1971 Term–Foreword: In Search of E trine on a Changing Court: A Model for a Newe tection, 86 Harv.L.Rev. 1 (1972). When no susp or fundamental interest or right is involved, the must nonetheless be reasonable, not arbitrary, a and fairly related to a valid government objectiv *lin v. Florida*, 379 U.S. 184, 191 (1964); *McGo land*, 366 U.S. 420, 425-26 (1961). If the classific

on suspect criteria or a fundamental right or i
fected, the statute can be upheld only if it is prec
to further a compelling governmental interest
Thompson, 394 U.S. 618 (1969). This rigid, no
two-tier approach requires the court to exam
and interest implicated and the nature of the
created in order to determine the appropriate le
scrutiny.[20]

A. THE INTEREST DIRECTLY AFFE EDUCATION

In 1954 Chief Justice Warren stated:

> Today, education is perhaps the most in
> function of state and local governments.
> sory school attendance laws and the great
> tures for education both demonstrate a rec
> of the importance of education to our democ
> ciety. It is required in the performance of
> basic public responsibilities, even service
> armed forces. It is the very foundation of
> izenship. Today it is a principal instrument
> ening the child to cultural values, in prepa
> for later professional training, and in helpin
> adjust normally to his environment. In the
> it is doubtful that any child may reasonabl
> pected to succeed in life if he is denied th
> tunity of an education. Such an opportunity
> the state has undertaken to provide it, is
> which must be made available to all on equa

Brown v. Board of Education, 347 U.S. 483, 4
other opinions the Supreme Court has re-empha
portance of education to members of modern so
endeavored to insure equal access to education
ities. *See, e.g., Ambach v. Norwick*, __U.S.__,
1589, 1594-95 (1979) (citing cases).

Nonetheless, the Supreme Court has stated t
tion, of course, is not among the rights afforded
tection under our Federal Constitution." *San*

School Dist. v. Rodriguez, 411 U.S. 1, 3
protection clause, however, does not s
those rights explicitly recognized in the
tution. "It is of course true that a law t
fundamental right explicitly or implicitly
stitution is presumptively unconstitutio
Thompson, 394 U.S. 618, 634, 638; id., a
opinion)." *Mobile v. Bolden*, __U.S.__,
1504 (1980).

In *Rodriguez* the Supreme Court cons
the method of financing public schools in
relied heavily on local property taxes. B
in taxable property values among the
tricts, substantial inter-district disparit
penditures resulted. The plaintiffs in *Ro*
the Texas system of financing public e
disadvantage children in poor school di
relative differences in spending levels
court stated that "no charge fairly cou
system fails to provide each child with
quire the basic minimal skills necessary
the rights of speech and of full particip
process." *Id.*, at 37. The challenged fin
cluded no one from the public schools.[21]
dren were denied admission because th
able to pay tuition.

The statute challenged in this acti
Many children received no education
the school districts in which they live
them admission, or because they cannot
quired. Those school districts which opt
ceive proportionately less state support
ercise their prerogative to exclude un
Under section 21.031, Texas has deci
children within their jurisdiction and
the benefits of education to others.

While holding that a system which c
for the education of some children tha

fringe upon a fundamental interest, Jus
the question whether absolute deprivat
portunity might require strict judicial
squarely presents the issue reserved by
in *Rodriguez*: what level of scrutiny sh
a statute absolutely deprives educatio
some children within the state's jurisdic

The Supreme Court noted in *Rodri*
court has the authority to sit as a "su
to create substantive constitutional ri
Mobile v. Bolden, __U.S.__, __, 100 S.
Lindsey v. Normet, 405 U.S. 56, 74 (
Williams, 397 U.S. 471, 485 (1970). No
gants present constitutional claims, the
or to determine whether their argume
the Constitution. The presumptive val
attaches to the actions of state legisla
shirk that responsibility. Our system of
courts to give their full attention to th
regardless of their novelty. With that sa
the question whether persons have a fu
access to education when the state has u
it to others.

Education is not among the rights aff
tion by the Constitution. The factors wh
mination of what rights and interests a
teed have not been identified clearly. I
Bd. of Elections, 383 U.S. 663 (1966), t

> Long ago in Yick Wo v. Hopkins, 1
> (1866), the Court referred to "the p
> of voting" as a fundamental politic
> preservative of all rights." Recentl
> Sims, 377 U.S. 533, 561-562 [1964
> doubtedly, the right of suffrage i
> matter in a free and democratic so
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> and unimpaired manner is preserva
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Id. at 667. According to this f
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the Constitution. *San Antonio*
guez, 411 U.S. 1 (1973), consi
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that education was a fundame
preme Court held that it was
Court reasoned that courts coul
ther the ability or the authority
the most *effective* speech or
choice." *Id.* at 36.

Initially, the issue in this cas
act affirmatively to maximize th
jurisdiction to exercise rights,
may choose to deny access to ed
persons within its jurisdiction.
to insure that the education p
all, or to require the state to ma
The plaintiffs seek only to parti
tem which has been established
This claim does not require a m
education that is constitutiona
imply that any resource which
guaranteed right must be pro
whether education is so closel
rights that a total deprivation
ly scrutinized. Before discussi
education and freedom of spe
whether the legal status of the
of the right to speak and to v
cludes that it does not.

First, there is little doubt t
good or for ill, are here to sta
that approximately ten perce
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Many of the permanent settler
United States and have come
await processing of their immi
ally, the current proposals on a
ship to many undocumented pe
See H.R. 9531, § 2a, 95th Con
qua, Legal Critique of Preside
documented Aliens, 23 Catholi
proposals may increase the n
from amnesty. Presently, many
in this country enjoy a form of *d*
boring legislation, in large part
Texan lobbyists, does its part t
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U.S.C. § 1324(a). The State of T
rejected efforts to discourage
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received indicates that the Con
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garded. It thus is likely that ma
sons in this country will remain
government inaction.[23] While
they should not be denied the ri
C. Antieau, Modern Constitutio

The rights of man are not a fu
Nonetheless, it has been sugge
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the United States was lawful.

> The Bill of Rights is a futil
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> But once an alien lawfully e
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Bridges v. Wixon, 326
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The authority to ac
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F.2d 1281, 1299 (5th
962 (1977), quoting,
(E.D.N.Y. 1975).

This useful doctrin
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Courts may decide t
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Barber, 357 U.S. 185,
U.S 206, 212 (1953); *U*
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As this effect is magnified many times, it is possible to perceive the impact of the creation of a permanent underclass of persons who will live their lives in this country without being able to participate in our society. Additionally, the expert testimony focused primarily on the impact of exclusion from school in the abstract. When this impact is combined with the language barrier which exists, the extent of the problem becomes apparent. The public school has been a mechanism to assimilate immigrants into our society. Uneducated children who eventually will be admitted into this country, will never be admitted into the society.

In Texas the provision of education is a state function and that a person may look to private schools instead does not alter this fact. Section 1 of Article VII of the Texas Constitution states: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." References to public education were contained in the Constitution of the Republic of Texas enacted in 1836. The first State Constitution adopted in 1845 represented the diversity of opinion then prevailing regarding the state's duty to provide free public education to all children seeking it. The Constitution of 1869, however, settled the question and "required for the first time a uniform system of public free schools for the gratuitious instruction of all inhabitants between the ages of six and eighteen (art. IX, sec. 1) with compulsory attendance (art. IX, sec. 5) and a highly centralized system of school administration (art. IX, sec. 3)." Vernon's Ann. Tex. Const. art. VII, sec. 1 (1876) (interpretative commentary). In 1884, with the enactment of the school law, the idea of universal public education became completely accepted in Texas.

Current statutory provisions reflect the State's control of education. One need only cite the compulsory attendance law, Tex.Educ.Code Ann. title 2, Sec. 21.032 (Vernon's 1972), to illustrate the State's involvement in education. The State's ability to compel attendance reflects the social recognition of the governmental interest in educating all persons within the jurisdiction.

Other areas which may be occupied by state activity do not share with education the connection to the essence of government. If the state operates a utility or public transportation in a locale, those activities constitute a government invasion of or supplement to the private sector, not essential state functions.

The provision of education also is quite dissimilar from "the bounty that a conscientious sovereign makes available to its own citizens and some of its guests." *Matthews v. Diaz*, 426 U.S. 67, 80 (1976). Additionally, the State's educational system cannot properly be classified within "the area of economics and social welfare. . . ." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). When a state enters an area occupied by the private sector and endeavors to assist persons to obtain food, shelter, or medicine, there is no requirement that the state create classifications which are perfect. A state may undertake charitable functions without undue concern about making distinctions which are too fine or too imprecise. Such determinations are replete with "conflicting claims of morality and intelligence. . . raised by opponents and proponents of almost every measure. . . ." *Dandridge v. Williams*, *supra*, at 486. The legislatures are entrusted to resolve conflicts concerning the boundaries of state involvement in these areas.

Judicial deference, however, should be limited in areas which are occupied by state functions. Where the state traditionally has been the provider, discrimination with respect to access to a service should be disfavored when there is a close connection between the particular service and implicitly or explicitly protected constitutional right. In effect, this is another way of saying that with respect to a service which is provided as an essential function of government and not by the private sector, exclusion from access to that service will result in absolute deprivation. This should be scrutinized carefully.

One reason supporting the Supreme Court's decision in *Rodriguez* not to classify education as a fundamental interest was that "the logical limitations" of the plaintiffs' theory were "difficult to perceive." *Rodriguez*, *supra*, at 37. No such open

ended theory is involved in this case. When only *acc* education is deprived, holding that a fundamental inte involved does not occasion an unprecedented upheaval would terminate state control over education. An inte a governmental process or program may be deemed mental even though the government cannot be requi assure or even to determine what constitutes enjoym that process or program. An analysis of the extent right to vote is instructive.

The right to vote requires quantitative and not qual protection.[38] Thus, while "a citizen has a constitutionall *tected right* to participate in elections on an equal basi other citizens in the jurisdiction," *Dunn v. Blumstei* U.S. 330, 336 (1972), in states that have adopted the el process, the courts do not sit to insure "the most *inf* electoral choice." *San Antonio Ind. School Dist. v. guez*, 411 U.S. 1, 36 (1973). The plurality opinion in *Mo Bolden*, __U.S.__, 100 S.Ct. 1490 (1980), illustrates th ciple that the recognition of access to the ballot as a fund tal right does not imply a right of equality of result. Th occasion that makes the equality of result actionable is such inequality constitutes invidious discrimination b of the nature of the classification used or the group af The "right to participate in elections on an equal basi other qualified voters" does not herald a revamping of litical system. The "right to have an equally effective in the election of representatives is impaired where sentation is not apportioned substantially on the b population. Such an inquiry is objective and quantitat provides no license for the court to embark on subj qualitative analyses of the effect of elections on dist groups or to guarantee the right to representation. Th presence of a voting rights issue does not compel stric tiny. *Holt Civic Club v. City of Tuscaloosa*, 439 U (1978); *Town of Lockport v. Citizens for Community at the Local Level, Inc.*, 430 U.S. 259 (1977); *Sayle Co. v. Tulare Lake Basin Water Storage District*, 41 719 (1973); *Creel v. Freeman*, 531 F.2d 286 (5th Cir. *cert. denied*, 429 U.S. 1066 (1977); Note, 93 Harv. I 1491 (1980). *See also Clark v. Town of Greenburgh*, 4

770 (2nd Cir. 1971). Finally, classifying access to the ba a fundamental right does not require the states to m government offices elected ones. Once the state has g the franchise, however, restrictions on the right to vot strict scrutiny. *Harper v. Virginia Board of Electio* U.S. 663 (1966). Similarly, recognition of a right to ac education need not imply a right to equality of result undercutting the holding in *Rodriguez*. Where inequa educational opportunities results from racial animus discrimination will be struck down upon proof of racial criminatory intent or purpose. *Brown v. Board of E tion*, 347 U.S. 483 (1954). The right to attend school equal basis with other children living in the locale do require revamping the educational system. Any inquir the exclusion of children from public education can be tive and quantitative. Recognition of education as a mental right does not mean that the presence of educa issues in a lawsuit will require subjective, qualitative sis concerning the effect of education on all discrete gr

In summation, the court concludes that strict judicia tiny should be applied to determine whether the s violates the equal protection clause. The bases for thi clusion are the following: the statute absolutely de undocumented children of access to education thereby ing them great harm; there is a direct and substantia tionship between education and the explicitly guara right to exchange ideas and information; and, the provi education is not a social or economic policy but a state tion. Additionally, recognizing the right to access to tion when it is being provided to others does not imply to equal enjoyment of education.

B. THE CLASSIFICATIONS CREATED BY SECTION 21.031

1. Undocumented Aliens

Section 21.031 on its face creates a classification of u mented [39] children who are treated differently than all children within the jurisdiction. The court must dete not only what level of scrutiny should be applied to the

such a classification, but also whether any sc
While the plaintiffs claim that discrimination a
mented aliens is inherently suspect, the State c
permissible *per se*.

With respect to the plaintiffs' argument, t
cludes that states may treat citizens and r
differently than undocumented aliens, provided
ferences are reasonably related to a valid gov
jective and do not affect fundamental rights. I
rights are affected, state treatment of undocur
like state treatment of other persons within it
is justified only if it furthers a compelling
interest.

In *Graham v. Richardson*, 403 U.S 365, 372 (
preme Court stated that "classifications ba
age . . . are inherently suspect and subject to
scrutiny." The equal treatment of resident alie
two premises. First, the federal decision to a
aliens to permanent residence required "a gene
all persons in this country shall abide in any
equality' of legal privileges with all citizens u
criminatory laws." *Takahashi v. Fish & Game*
U.S. 410, 420 (1948). Second, in *Graham v. Ri*
pra, the court stated that "[a]liens as a class a
ample of a discrete and insular minority . . . f
heightened judicial solicitude is appropriate." *
ing United States v. Carolene Products Co.,
152-53 n.4 (1938). Undocumented aliens are
such disabilities, . . . subjected to such a histo
ful unequal treatment [and] relegated to such
political powerlessness . . ." that treating ther
crete and insular than resident aliens may
Nonetheless, undocumented aliens are not e
privileges conferred by admission to the countr
decision to admit resident aliens would be frust
restrictions on their activity. *Truax v. Raich*
(1915). The federal government has made no
concerning undocumented aliens.

Focus on the *Carolene Products*[41] rationale,
undocumented aliens are a class needing prote

majority and the political process. The politi
made insufficient efforts to exclude undocur
from the country and while they are here
quite willing to exploit them for their cheap
ally, the concerns of state governments norm
lated to the alienage or legal status of resid
Graham v. Richardson, 403 U.S. 365 (1971).
to classify based on a person's status as a cit
within "narrow limits." *Sugarman v. Dougal*
(1973). Accordingly, the normal deference giv
tion over matters which are the usual subject
lation is not justified when state classificatio
citizenship, or when no special attribute of cit
vant.[42] Nonetheless, the court concludes that
aliens are not a suspect class.

The guarantee of equal protection is a restr
eral government as well as the state governm
There is little question that the federal gover
undocumented aliens differently from citizens
iens. The Supreme Court explained in *Matthe*
U.S. 67 (1976), that the federal government c
imate distinctions between citizens and resi
cause of the governmental interest in regul
tion. The courts have not required the federal
show that the distinctions they make are prec
the exercise of the power to regulate immig
uralization.[44] Rather, federally drawn distin
aliens and citizens are upheld where there is
sis for presuming that the distinction was actu
serve an overriding national interest. *Hampt*
Wong, 426 U.S. 88, 103 (1976). Accordingl
of equal protection analysis, the federal po
immigration is sufficient to justify federal
against aliens. Further, the state's ability to
tinctions where their interests are apparent
the *Truax-Takahashi* rationale should contro
ham Court's reliance on *Carolene Products*,
considering whether strict judicial solicitude
tended to undocumented aliens.[45]

This does not imply that classificati
mented aliens are permissible by thei
the equal protection clause is inapplicat
umented persons. Analogous decisio
Court, the language of the fourteenth a
ings of other federal courts require tha
based on immigration status be subject

Although the Supreme Court has nev
ly the applicability of the equal protect
mented aliens, decisions construing th
ment do not suggest that the guarantee
reserved to citizens or resident aliens.
both the due process and equal protec
resident documented aliens. *In re G*
(1973); *Sugarman v. Dougall*, 413 U.S.
v. Richardson, 403 U.S. 265 (1971); *T*
Game Comm'n., 334 U.S. 410 (1948); *V*
States, 163 U.S. 228 (1891); *Yick Wo v*
356 (1886). The Supreme Court stated in
equal protection clause applied "to all pe
ritorial jurisdiction" of the United State
Yick Wo v. Hopkins, *supra*, the Supren

> The Fourteenth Amendment to the
> not confined to the protection of c
> "Nor shall any state deprive any p
> erty, or property without due pro
> deny to any person within its juris
> protection of the laws." These pro
> versal in their application, to all pe
> territorial jurisdiction, without re
> ferences of race, of color, or of nat
> equal protection of the laws is a pl
> tection of equal laws."

118 U.S. at 369. Inasmuch as undocum
tected by the due process clause, *Matth*
67, 77 (1976), the court can conceive of
that they are unprotected by the equal

The language of the amendment itsel
the proposition that undocumented alie

within the state may not invoke the eq
Undocumented aliens, like other hun
sons." The question, then, is whether a
is a "person within the jurisdiction" o
concludes that the qualification "with
the state should be given its commo
Accordingly, undocumented children w
are subject to its laws are "within the
Both the legislative history and the cas
ification confirm this conclusion.

There is no indication that the fra
amendment intended to limit which in
in the United States were "persons" fo
equal protection purposes. In fact, one
amendment said:

> The last two clauses of the first sec
> ment disables a State from depri
> citizen but any person, whoever
> liberty, or property without due
> from denying to him the equal pro
> of the state. . . .
>
> . . . [I]t will, if adopted by th
> disable every one of them from pa
> ing upon those fundamental rig
> which pertain to citizens of the U
> to all persons who may happen
> jurisdiction.

71 Cong. Globe 2766 (May 23, 1866).
tive history which groups the two cla
to interpret "any person" under the
ferent from "any person within its j
equal protection clause.

This does not mean that the langu
represents an inherent limitation on g
Blake v. McClung, 172 U.S. 239 (189
held that a Virginia corporation was
jurisdiction of Tennessee. The Court
protection clause

> manifestly related only t
> equal protection to persons
> Observe that the prohibit
> tion of property without d
> qualified by the words "
> while those words are f
> clause relating to the equa
> The Court cannot assume t
> serted without any object
> eliminate them from the C
> pret the clause in question
> found in that instrument.
> state what is the full impo
> its jurisdiction," it is safe t
> not created by Tennessee,
> under conditions that subje
> from the courts of Tenness
> ors, is not, under the ab
> teenth Amendment, withi
> state.

Id. at 260-61. To recognize the
register approval for discrimi
Rather it is a recognition that

> Manifestly, the obligation
> protection of equal laws
> where its laws operate, tha
> diction. It is there that th
> must be maintained. That
> the Constitution upon the
> ernmental entities,—each
> laws establishing the righ
> within its borders.

Missouri ex. rel. Gaines v. Can

The reason for limiting the r
vious: it necessarily is limited
diction.

> A most extraordinary co
> legislation of the states pr

appropriate sphere were
it does not extend to ar
their jurisdiction. A leg
created. Neither the n
move forward; the forme
ters purely of state conc
Constitution, and the la
effect none if they cann
and without their jurisd

Dolley v. Abilene Nat. Ban
1910), *aff'd*, 228 U.S. 1 (19
within the state stand in suc
them "within its jurisdictio
clause "does not prohibit legis
the objects to which it is dir
which it is to operate. It m
subjected to such legislation
circumstances and conditions
and the liabilities imposed." *
ings Bank, 170 U.S. 283, 293
U.S. 68, 71-72 (1887). *See al*
York, 134 U.S. 594 (1890). T
are persons subjected to the
this action. They are physical
Texas. *Shames v. State of Ne*
1338 (D. Neb. 1971).[47] Other
that the equal protection
aliens. In *Bolanos v. Kiley*,
1975), Judge Friendly stated
due process and equal prote
Amendment apply to aliens
and even to aliens whose pr
Holly v. Levine, 529 F.2d 12
U.S. 954 (1976); *United Stat*
n.3 (2nd Cir. 1975); *Doe v.*
(E.D.Tex. 1978). *See also He*
Dist., 558 S.W.2d 121 (Tex.
ref'd n.r.e.).

Accordingly, the eq
mented aliens because
tion" of the state. Sta
is not necessarily perm
is infringed by that di
compelling justificatio

**2. Exclusion of Undo
Wealth**

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unable to attend scho
tion. Section 21.031
State has authorized t
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against children on th
children who cannot a
tonio Ind. School Di
(1973), the Supreme C

> If elementary an
> available by the
> tuition assessed a
> a clearly defined
> in terms of thei
> sum—who would
> ceiving an educati
> more compelling s
> sistance than the

That set of circumstan

Several of the name
prevented from atten
could not afford tuitio
any children being ad
tricts which condition
This is not surprising
parents of undocumen
digent. A study of th
undocumented childre
mean hourly wage w

1978 found that the
persons was $2.75.
stated that: "The si
mented person . . .
States."[54]

It is worth noting
contribute to gover
others with similar
which discuss the co
cal, state and feder
group pays more in
through social servi
istence and the fea
aliens are one of the
vices. The public sc
marily through sale
Undocumented alie
those taxes; they b
contribute property
rent.[55]

The Supreme Cou
the basis of wealth
two conditions are
class of disadvantag
access to a state ben
or service must not
cial welfare." *United*
Both of these condit
of undocumented ch
ment is definable in
scribed sum. . . ." *
This is not a questio
advantages. The ar
resources occasione
benefit.

It has already bee
ered a social or ec
perhaps the most i
government." *Brow*

493 (1954). Ex
Court has hel
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The Supren
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and who had n
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v. Short, 401
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> indigent

401 U.S. at
508, 509 (197
not require "t
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dens." *San A*
1, 22 (1973). I
dren do not c
indigency. Th
they are unal

In cases af
U.S. 663 (196
statutes whi
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circumstanc
case claime
tion becaus

required to insure absolute equality which exists only hypothetically. On the other hand, absent sufficient justification, states may not permit some persons to benefit from certain state services and to be free from certain burdens because while others are barred completely because they cannot pay.

The form of "wealth discrimination" upheld in *Rodriguez* is not encountered in this case. Accordingly, the court concludes that a state law which operates to deprive absolutely children of education when they are indigent should be scrutinized with care.

3. Innocent Children

Section 21.031 penalizes children because of acts committed by their parents.[58] In *Doe v. Plyler*, 459 F.Supp. 569 (E.D.Tex. 1978), Judge Justice stated:

> A more exacting scrutiny of the Texas law also appears warranted when consideration is given to the decisions of the Supreme Court refusing to penalize and stigmatize children who are not in a position to prevent the wrongful acts of their parents. As Mr. Justice Powell said of laws disfavoring illegitimate children:
>
> > [V]isiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the . . . child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing.
>
> *Weber v. Aetna Casualty and Surety Company*, 406 U.S. 164, 175, 92 S.Ct. 1400, ,1406, 31 L.Ed.2d 768 (1972) (footnote omitted). *See also St. Anne v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974) (invalidating school board's decision to suspend two children from the school because their mother had assaulted an assistant principal, on the ground that "[f]reedom from punishment in the absence of *personal*

> guilt is a fundamental concept in the American scheme of justice." While the undocumented minor plaintiffs are of course legally culpable and subject to deportation, they can hardly be held morally responsible for their presence here. Many of them were hardly more than infants when they arrived in the United States, nor did they participate in their parents' decision to emigrate; consequently they deserve no additional burdens or penalties.

Id. at 582. The court finds that this analysis is supported by the evidence received in this proceeding.

Undocumented children do not enter the United States unaccompanied by their parents. Like other young children, they seldom have the power to choose their place of residence. For example, the court heard testimony from a young girl who entered the United States when she was five months old. Although the girl's father is a United States citizen and the child's mother is a documented resident alien, the child has no documents. She is, of course, documentable. Nonetheless, due to her difficulty receiving her Mexican birth certificate, she remained undocumented and was excluded from school. The young girl previously had attended school in New Jersey and Missouri. Her eight year old brother was born in the United States and attends school.[59] There also was testimony from another undocumented child who has siblings who were born in the United States and thus are citizens.[60] Any argument that the family should be treated as a unit when moral culpability is assessed is undercut by these facts. Those who were born a few years prior to the unlawful entry are no more responsible for it than those born shortly afterwards.

Cases involving classifications which punish children for acts committed by their parents are not subject to strict judicial scrutiny. They nevertheless are invalid if they are not substantially related to permissible state interests. *Lalli v. Lalli*, 439 U.S. 259, 264 (1979). This formulation of the rational basis test will not accept any conceivable justification for a statute. The legislative means as well as the ends are subject to examination.

4. National Origin

It is suggested that section 21.031 is part of an historica
tern of discrimination against Hispanics in Texas. It is argue
Mexican-Americans residing in Texas will perceive excludi
documented aliens from school as more discrimination a
Hispanic people. Suffice it to say, the court concludes that
has been invidious discrimination in Texas against persons
count of their national origin. There has also been discrimi
against persons on account of their illegal presence i
country. The statute, however, creates a classificaiton
loosely on immigration status, not national origin. State legi
discriminating against a class of undocumented persons i
missible if it is sufficiently justified. The amount of justificai
quired should not vary depending on the citizenship of a
documented person. It also should not be dependent
history within a particular state regarding discrimination a
citizens of a particular national origin. Thus, a state which
has discriminated against Mexican-Americans bears no
burden of justificaiton for discrimination against Mexica
documented persons. Conversely, the court concludes th
State of Texas could not pass legislation which would be inv
to Mexican citizens, but valid as to other aliens. The court
condemn section 21.031 on the basis of ***Yick Wo v. Hop***
118 U.S. 356 (1886). Although the State generally monitor
pliance with the section by examining the immigration st
citizenship of Spanish-surnamed persons, there is no ev
that non-Hispanic aliens are intentionally treated differentl

C. STATE RATIONALE FOR SECTION 21.03

In defense of its decision to exclude undocumente
dren from the public schools, the State presented ev
concerning (1) the number of undocumented children i
as; (2) the financial impact of educating these child
state and local resources; and (3) the impact of educati
documented children on the quality of education and o
pliance with desegregation orders. The State conten
the equal protection clause does not apply to undocur

aliens and thus that discrimination against members c
class is permissible no matter how invidious. Noneth
the State offered evidence which it believes demons
that section 21.031 is supported by a rational basis.

At the outset, the evidence demonstrated that prior
passage of the amendment to section 21.031 in 197
State never had attempted to determine the number
documented children attending Texas public schools, n
impact of educating these children upon the school dis
The current Commissioner of the Texas Education A
was the Deputy Commissioner at the time section 21.03
enacted and he was then primarily responsible for its i
mentation. He testified that no one from the Texas Le
ture contacted anyone at the Texas Education Agency
to the amendment. No studies were conducted to dete
the number of undocumented children throughout the
or the fiscal impact of educating them. No one attempt
compare the amount of taxes paid by undocumented
with the cost of educating undocumented children.[61]

Since the law was amended, the State has done very
to monitor the implementation of the statute by the
school districts. There is no evidence that the State has
determined the number of local school districts which a
cluding undocumented children, the number of schoo
tricts that charge tuition, or the number of school dis
that provide tuition-free education to all children within
jurisdiction. Because this basic information has not
gathered, no effort has been made to determine the nu
of children actually affected by section 21.031. There is
**ta which show that the academic performan
students has improved since undocumented chi
were excluded.**[62]

Indeed, the evidence in this case indicates that the
has been concerned primarily with the impact and num
documented Mexican children. With the exception of a
commissioned in connection with this case, the State
sored studies have concentrated on the characteristi
number of documented immigrant children. The studie
shown a steadily increasing number of immigrant chi
primarily in the border areas. In addition, the studie

cate that most of the children require bilingual e
that the influx of these children has created a p
border districts that have limited space to ho
dents.[63] Funds provided to the local school dis
**State may not be used for construction[64] a
with relatively small amounts of taxable p
growing student populations have difficul
new structures. This problem however, is n
school districts with decreasing student
and adequate taxable property.**

The current conditions afflicting some bord
tricts result in part from the influx of docum
These new residents offset the decline in schoo
tion which is being experienced elsewhere in th
der school districts are not in danger of being a
documented children who reside in Mexico atter
lic schools in Texas. In 1977, the Texas Legislat
section 21.031 by adding subsection (d) which re
not living with a parent or guardian to estab
presence in the school district is not for the pri
of attending the public free schools." This prov
signed in part to prohibit children whose par
Mexico from being able to establish residence
States by living with another family.[65]

1. The Number of Undocumented Children ir

The State's assumption concerning the poten
undocumented children on the public schools i
estimate of the number of undocumented child
residing in Texas. It must be emphasized that
rent figure is of concern; no evidence was offe
plied that the number of undocumented chil
Texas and attending the schools in 1975 had
public education. Thus, the State does not a
number was so great in 1975 that it was necess
undocumented children, but that once they
cluded there are too many to incorporate them

In preparation for the trial of this case the St
to calculate the number of undocumented child
the State. Experts in the area are in general a

there is no indisputable or acceptable estimat
mented alien population in the United States
number of undocumented alien children.[67] Thi
ing given the difficult methodological proble
attempting to enumerate a clandestine popu
this context that the State's estimate must b

The State's study was conducted by Mark
ployee of the Dallas firm, Criterion Analysis.
Criterion Study)[68] attempted to estimate the
ber of undocumented children residing in T
step was to calculate the "documented Hisp
population." Assuming that only documente
in the school system, Criterion obtained th
"figure" by totalling the Hispanic students in
private schools, and those reported as "sch
the second step, Criterion subtracted the "do
panic school age population from the census fi
panics in Texas aged five to seventeen. The re
was called the "potential undocumented Hisp
population."

Criteron attempted to verify the assumpt
sidual represented undocumented children b
same methodology to the total school age p
races. Because the residual for all races was n
larger than the residual for Hispanics, Crit
that the methodology in fact calculated
children.[69]

The major shortcoming of this analysis is t
an estimate of the number of children not en
rather than of undocumented children. To as
dren not enrolled in school are undocumente
sound.[70] Two aspects of this study demonstr
this assumption. First, under the methodol
Criterion study, the residual "potential undo
panic population in 1970 is found to be 80
school districts admitted undocumented ch
1975, there is no basis for concluding that t
enrolled in school in 1970 were undocumer
Hispanic children purportedly out of school a

to be documented as undocumented. M
inexplicably does not demonstrate any
Hispanic children not enrolled in school
of the exclusionary statute.[72] Thus, t
strates no correlation with what one wou
be the pattern caused by the implementa
in 1975.

Second, the study uses two different
in an inflated estimate of the number
school. The 1970 census estimate of tota
public schools for all races is comparabl
However, when broken down ethnical
shows more Hispanics enrolled and few
than does the TEA data.[73] This discrep
Hispanics between the census and the T
due to the use of a more limited Hispani

Inasmuch as the study subtracted th
lower estimate of Hispanics, from the
higher estimate, to determine the numb
children, the figure was necessarily hig

The unsoundness and unreliability of
ogy is further demonstrated when one
sumption of the study to the blacks a
Analysis of either census enrollment
TEA data, results in the rather bizarr
clusion that there are at least 100,000
and white children in Texas.[76]

Even if one accepts the flawed assur
the study, four additional problems res
timate of the number of undocumente
First, Criterion's analysis of school leav
dren under 17 who dropped out wou
of state compulsory attendance laws.
school leavers, however, defines a sch
who "left school prior to graduation and
trict's knowledge will not enroll in an
Criterion's analysis, documented sch
leave school and do not return are co
"potential undocumented" children.[77]

Second, the study neglected to tak
mented five and six year olds who h
school. A breakdown by age and cens
of the children not enrolled in schoo
are five or six years old. This error w
the number of "potential undocumer
at least one half. The study used two
which did not measure children in t
The census data covered only ages f
TEA enrollment data includes childr
age groups.[78]

Third, the study ignored the censu
children. When census and TEA d
making necessary adjustments for cr
two independent data sources, unreli
An expert in census data on Hispani
terion study was "not . . . done by a
derstands the census data."[79] When
TEA data, census enrollment data de
sus had higher enrollment estimates
and lower estimates than TEA for wh
lidity of the study is founded on the
tions for blacks and whites. This is a
found in the two data bases, and w
compensate for the cross biases the
See supra footnote 76.

Finally, while attempting to estir
mented children," the Criterion study
the children not in school. Reliance
ment data suggests that it may not
of that statistic. One State witness t
ticular year the enrollment data for
dent School District were in error by
percent.[81] If this is typical, the Cri
meaningless . . . [because] the error
to arrive at the measurement would
surement itself."[82] The court finds t
does not represent an accurate estim
documented children in Texas.

The study by no means sug
by the demographers who hav
for years should be rejected. I
ered the foremost authority on
documented Mexican nationals
that he calculated the numb
school age children in Texas to
estimate is much more in lin
which have been done by othe
entists attempting to assess th
of undocumented Mexican na
States.[83]

The final element to the que
argument that providing edu
dren would serve as an induce
persons to cross the border.
suggests that one of the base
slow the flow of illegal immig
statute is impermissible. Mea
decrease immigration, whethe
ince of the federal government
351 364 (1976), the Supreme C
to regulate immigration is unc
eral power." Insofar as the Sta
ducements to immigration, the
permissible state interest.

In addition, the evidence de
ed persons do not immigrate in
tion. Virtually all of the undo
into this country seek employ
ucational benefits. The State
ability of jobs is the major fact
aliens into the United States.
dence of the primacy of emplo
for immigrants,[85] and of the un
as a stimulus for immigration."
that other social services in thi
or sought by undocumented
those services has not been sh

of illegal immigration. Undoc
Texas with a vision of Amer
they come here to work. Fin
excluding undocumented per
There is no evidence that othe
number of undocumented pe
those states because of the a
tion. The court finds that free
significant attraction for undo

Fiscal Impact

The State contends that s
rational basis because it sa
State's resources; educating
more and would spread the
thinly. This, it is argued, wou
ity of education in the State,
for other social services. One
tion Agency used this analog

> If our total population ca
> ple on an oceanliner and
> liner has gone down, an
> boat and the life boat hol
> ready have fifty people o
> what similar to the situa
> we have the capacity for
> a need for a greater capa
> pacity, but we still have
> still people out there in t
>
> Now if I make the d
> that life boat, that I wil
> dred people and sink tha
> saved, would I be justif
> low some of those peopl
> drown so that I can sav
> have in the boat?
>
> . . . . We can stretch
> get to the point when th

> equately meet th
> the teachers are
> ing to quit teach
> sort of situation
> down.
>
> . . . . You have
> save. You have t
> number of childr
> or nearly adequat
> some way determ
> insignificant (sic)
> services would t
> that none of th
> served.[89]

Without suggesting
ever justified, the cou
case. Permitting undo
schools clearly would
idence does not indi
school districts lack t
for the State noted in

> There is no plac
> State has said
> enough money.
> with the money.
> fund certain proj
> to fund it. The St
> in its budget.[90]

Without a reliable
ed children in the Sta
nancial savings that c
excluding children fr
Nonetheless, the evid
the local school distri
ucate the undocumen

Initially, Texas en
of economic growth

showed a closing bal
for funds that can b
represents a 3.7 per
the beginning of the
mendable fiscal polic
court by no means w
integrity. Nonethele
42nd of the fifty stat
is necessary to exam
ates money for educa
expense of educatin

The witnesses agr
derived from consum
Revenues raised by
Monies for education
nue Fund, the Omni
Motor Fuel and Ta
Fund.[93] Each one of
plus) as of August 31
General Revenue Fu
years, and for at lea
$600 million.[94] The
that the General Re
$324.4 million at the
jected surplus is su
tion of all undocume
correctly estimated
age children. The I
$1,200.00 per studer
average daily attend
the State would be
the school districts.
and the current stat
both the current nu
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mented children wo
diture by $70.00. A
has grossly overesti
dren in Texas.

The impac
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problems ar
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ficulties are
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cities."[n] Inste
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The State
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plight of pr
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tricts and t
teacher salar
the schools.

3. Bilingual

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way to pre
children in
than a hyp

affect desegregation. The State did not even attempt to show that compliance with desegregation orders would be made more difficult. The State's bald assertion is insufficient to provide even a conceivable basis for the statute.

D. APPLICATION OF JUDICIAL SCRUTINY

Maintaining the fiscal integrity of the public schools is an important and legitimate state interest. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).[101] States have the responsibility of safeguarding all monies entrusted to them by the taxpayers and these demands are increased when a fundamental state function such as education is involved. That does not mean that any measure which saves money is constitutional. The court has concluded that the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit. When strict judicial scrutiny is appropriate, important or legitimate governmental interests are not sufficient to justify legislative classifications. The classifications, if they are to be upheld, must be shown to be necessary to promote a compelling governmental interest. *In Re Griffiths* 413 U.S. 717, 721-22 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Graham v. Richardson*, 403 U.S. 365, 375-76 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969); *Carrington v. Rash*, 390 U.S. 89 (1965). Additionally, the factor which is the basis for differentiating between persons otherwise equal may not be capricious or irrelevant; it must be germane to the effectuation of the State's interest. *United States Department of Agriculture v. Moreno*, 413 U.S. 528, 535-38 (1973); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971); *Oregon v. Mitchell*, 400 U.S. 112, 243 (1971) (Brennan, J., dissenting); *Turner v. Fouche*, 394 U.S. 346, 362 (1970); *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954). Finally, the State is required to show that there are no less restrictive alternatives available. *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The State has not carried this heavy burden of justification.

First, the concern for fiscal integrity is not a compelling[102] state interest. *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

Second, the State has not shown that excluding children from school is in any way necessary to the improvement of the education in the state. As the State argued in *Rodriguez*, there is no evidence that the quality of education is somehow strictly tied to the amount of money expended on each child. 411 U.S. at 24 n.56, 42-43 & n.86, 46 n.101. The State now wishes the court to assume without any credible supporting evidence that a proportionately small diminution of the funds spent on each child will have grave impact on the quality of education. Naturally, the court shares the State's concern for the quality of education. This memorandum should be ample evidence that this court believes that education is a critical state function. Barring the doors to a distinct group of children, however, is the most, not the least, drastic alternative available.

Third, the State has not shown that the classification used actually advances the state interest. The classification employed by the statute is, loosely speaking,[103] a function of federal immigration status. The undocumented children are otherwise similarly situated to the other children in the State. Nothing about their immigration status by itself distinguishes them from other children in terms of their educational needs.[104] The parents of undocumented children, along with other parents, finance public education. The classification used is wholly irrelevant to the achievement of the State's objective. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). The exclusion of undocumented children no more relates to the saving of educational resources than does denying access to education to a similar number of documented and citizen children. The State never attempted to examine the impact of undocumented children on the schools before deciding to exclude them. It is thus not surprising that the classification used is in no way carefully tailored or drawn to advance the state interest.[105]

Equal protection of the laws is meaningless unless it applies to the unpopular as well as the popular, the weak as well as the strong. As the Supreme Court has stated:

> Equal protection of the laws is something mor
> than an abstract right. It is a command which th
> state must respect, the benefits of which every pe
> son may demand. Not the least merit of our const
> tutional system is that its safeguards extend to all-
> the least deserving as well as the most virtuous.

Hill v. Texas, 316 U.S. 400, 406 (1942). The undocum
children residing in the State of Texas are entitled t
protection. Section 21.031 of the Texas Education Cod
not employ a classification which is necessary or substa
related to a compelling governmental interest.[106] A
ingly, that statute violates the equal protection clause
fourteenth amendment of the United States Constituti

III. PRE-EMPTION

State legislation which improperly encroaches
an area of federal responsibility or concern will be
invalid under the pre-emption doctrine. The
emption doctrine has two elements: state legislat
pre-empted if it regulates matters which are subje
exclusive federal legislative control[107] or if it con
with the effectuation of congress
objectives. Under the first formulation, congress
power should be deemed to "oust" state authority
"the nature of the subject matter permits no othe
clusion" or when Congress has unmistakably so or
ed." *DeCanas v. Bica*, 424 U.S. 351, 356 (1976), *qu*
Florida Lime & Avocado Growers v. Paul, 373 U.S
142 (1963). In the second circumstance, whe
federal legislation contemplated complimentary
legislation, state law will be held invalid if it "stan
an obstacle to the accomplishment and execution
full purposes and objectives of Congress." *Hi*
Davidowitz, 312 U.S. 52, 67 (1951).

The issue before the court is whether Title I o
Elementary and Secondary Education Act of 1965
I) pre-empts section 21.031 of the Texas Educ
Code. Title I does not reflect a congressional inten
occupy or to oust the states from the field of educ
and the nature of the subject matter certainly pe

the contrary conclusion. Accordingly, the iss whether section 21.031 burdens or conflicts with fe objectives. In order to determine whether su burden or conflict exists, it is necessary to examir objectives and statutory schemes of both legisl provisions.

There is no legislative history accompanying the amendment to section 21.031, yet it is possible to asc governmental objective to the statute. The purpose o tion 21.031 has been described as the protection of the integrity of state and local educational programs. The od used to save money is to reduce the number of stu and in particular the number needing bilingual educatio though legislative history of a subsequent amendment t tion 21.031 suggests that the Texas Legislature may had other motives, *see* n.84 *supra*, the court will assum the Legislature had no illicit purposes and that the st was not intended to regulate a matter subject to exc federal power. Education is a matter of state and loca cern under the police powers.

Title I, 20 U.S.C. § 2701 *et seq.*, is the major progr federal aid for elementary and secondary schools. E stated, Title I provides funds to state and local educa agencies for the development and implementation of cor satory programs designed to supplement the educatio vided to those children targeted by Congress as "educ ally deprived." The declaration of policy found in Title U.S.C. § 2701, states:

> In recognition of the special educational needs children of low-income families and the impact tha concentrations of low-income families have on th ability of local educational agencies to support ad quate educational programs, the Congress hereb declares it to be the policy of the United States t provide financial assistance (as set forth in the fo lowing parts of this subchapter) to local education agencies serving areas with concentrations of the educational programs by various means (includir pre-school programs) which contribute particular

> to meeting the special educational needs
> tionally deprived children. Further, in r
> of the special educational needs of childı
> tain migrant parents, of Indian childr
> handicapped, neglected, and delinquent
> the Congress hereby declares it to be th
> the United States to provide financial ass
> set forth in the following parts of this s
> to help meet the special educational nee
> children.

The Title I Migrant Program, 20 U.S.C. §§
resents a congressional commitment to the e
a federal program designed to provide an el
nuity to the education of children whose par
tory agricultural workers.

> These children have often been called the
> cationally deprived children in America.
> tional Advisory Council on the Educatio
> vantaged Children has stated: "the migr
> constantly moving; he has no continuity
> cation or his life in general; he is in the ta
> of non-English speaking children in the
> gram. He is out of the mainstream of an
> ciety and has few bases for security. H
> are in the fields all day, and in the forma
> and later, he is either there, working wit
> at home babysitting with the younger ch

3 *U.S. Code Cong. & Ad. News* 4113 (1974).

The annual federal appropriation for Title
$3 billion.[109] Ninety percent of the school distri
try participate in the program; approximately
dren currently are being served. 5 *U.S. Cod*
News 4973 (1978). Of the various kinds of
privation recognized under Title I, it is th
child and the migrant child who rank first and
tively in terms of the amount of money appro
category. Participation in the program is ent

both on the part of the states and on the par
districts within the state. Since its enactm
there has been consistent participation by nir
all school districts in the state.[110] Nothing in
regulations distinguishes between documente
mented children.

The amount of money a state will receive u
for Title I funds is computed through the use
formula." 20 U.S.C. § 2711. Briefly, a state's a
termined by multiplying a percentage of the s
expenditure by the number of children residi
aged five through 17 from families below the p
counted in the 1970 census. According to th
there are more "formula" or impoverished ch
in Texas than in any other state. Based upon
in the state, Texas has received $1.3 million in
revenue since the law was enacted.[111] Over c
amount, almost $600 million, has been allocat
since fiscal year 1976 and the enactment of se
Undocumented children play an important ro
tual allocation of Title I money to Texas. The
sus made every effort to count every indi
within our national boundaries in the 1970 cer
parent that substantial numbers of the "formu
in fact undocumented children.

In contrast to the general Title I program
census statistics to determine the residency
dren for the purposes of federal funding, the
Program involves an ongoing effort to identif
migrant child residing in the United States. C
migrant child is identified, he is given an ider
ber and is then enrolled in the migrant stude
tem (MSRTS), and a computer record is main
migrant child in the United States.[114] In accor
federal funding formula, the number of migra
rolled in the MSRTS and found to be residing
ing a given year determines the amount of
Funds to be awarded to that state in the su
year.[115]

Texas, like other states participati
Program, is under a federal obligatio
ble migrant child residing in the stat
the MSRTS. 45 C.F.R. §§ 116d.10(
39(f). These children do not have to
be identified and enrolled in the MSR
the federal definition of current or f
regulations pertaining to the identif
dren are interpreted as a blanket pr
ing into the immigration status of eitl
45 C.F.R. § 116d.12. There is no que
undocumented children into the MSI

As a result of the ironic relationshi
utes, Texas receives money for edu
government because of the presence
cluded from school. The children are
federal funds supplementing their
they receive no education at all. Des
State, the court concludes that Title
tion 21.031.

Whether a state statute stands a
complishment and execution of the
tives of Congress requires two sep
first be determined whether there is
the express provisions of the very te
California v. Zook, 336 U.S. 725, 72
ington, 302 U.S. 1, 4 (1937). *See als*
U.S. 351, 363-65 (1976); *New York*
Servs. v. Dublino, 413 U.S. 405, 422
cific conflict between the state and
pliance with both the state and feder
cal impossibility. *Florida Avocado G*
132, 142-43 (1963). The State's actio
any specific provision of Title I, ar
face, is not inconsistent with the fed

Second, the court must "consider
state and federal laws as they are
not merely as they are written." *Jo*
430 U.S. 519, 526 (1977). The salient

it is designed to provide supplementar
tional agencies. This major purpose is
accomplished unless all formula childr
financing scheme employed by Title I
all formula children must benefit from
First, the census was used to compute
children despite criticism; it was simp
able. It continues to be used (along wit
mulas) even though there have been
the intervening decade. The childre
years old in 1970 were thirteen to twe
the use of the census was reaffirmed
counted in 1970 in the north had move
this was recognized, Congress contin
Second, a child may be "formula eligib
the statute not benefit from supplen
educational agency may "skip" certai
number of formula children to provi
schools with a greater number and
low-income students. Looking at th
a whole, Title I does not pre-empt
prevents formula children from bene
funds. For example, Title I does not p
tion program which omits kinderga
olds are formula children. The court c
the formula does not designate the chi
fit from federal assistance, but rather
tain significant numbers of educationa

Finally, the voluntary nature of T
finding that section 21.031 is pre-em
the state has received over $600 milli
the state statute was amended. The C
tion (now the Secretary of Educatio
that Title I pre-empts state programs
consistent with the federal objective
reached a similar conclusion in *New*
cial Servs. v. Dublino, 413 U.S. 405 (

Moreover, the Depart
and Welfare, the agenc
for administering the F
including reviewing
never considered the
emptive. HEW has foll
of approving state pla
requirements so long a
arbitrary or unreason
knew of this settled
time of enactment of W
had welfare work progr
passage, HEW has con
requirements. Pursuan
has received federal gr
of its FTC plan, includi
terpreting this statute
"the construction of a s
its execution should b
compelling indications
Lion Broadcasting Co.
(1969); *Dandridge v. W*
In this case, such indic

Id. at 420-21. The quoted l
the question of congressio
less, it also suggests that
vides for voluntary particip
of state plans should not be
state laws that both cannot
tion could withhold payme
withhold or reduce payment
tricts. 20 U.S.C. § 2836(a).
eration of both statutory s
one another without holdin
Cf. Silver v. New York Sto
(1963). In this instance, wh
exists, any conflict betwee
should be resolved by coo

and not judicial decree. *See D*
court concludes that Title I of
Education Act does not pre-e
Education Code.[118]

IV. INTERNATIONAL LA

A. Section 21.031 and United

The United States is a m
American States, having rat
ter on June 19, 1951. 2 U.S.T
tered into force December
amended by the 1967 Protoc
ratified by the United States
6847, O.A.S.T.S. No. 1-A, O.A
2 (entered into force Februar
sions of the amended Charte
with education. Article 31 pro

> To accelerate their eco
> ment, in accordance wit
> procedures and within th
> cratic principles in the
> American system, the me
> cate every effort to ac
> goals:
>
> . . . .
>
> h) Rapid eradication of i
> educational opportunitie

Article 47 provides:

> The Member States will
> in accordance with their
> insure the effective exer
> tion, on the following ba
>
> a) Elementary educ
> dren of school age, shall
> who can benefit from i
> State it shall be without

b) Middle-l
progressively to
ble, with a view
diversified in su
ment needs of
providing a gen
c) Higher
provided that, i
the correspondi
dards are met.

The plaintiffs assert
is a self-executing tr
21.031 under the su
cl.2.

A treaty is an inte
ture between two
made under the aut
preme law of the lan
ternal law of the Uni
law only when that
legislation or is, by
Robertson, 124 U.S.
U.S. (2 Pet.) 253, 3
F.2d 862, 875 (5th Ci
242 P.2d 617 (1952);
tions Law of the Uni
statement). Accordi
made by the United
tic law in the United
the United States a
§ 141, comment a
domestic law of the
binding on the Unit
non self-executing,
Congress.

Whether a treaty
tation to be determi
tal, 589 F.2d 862, 8

555 F.2d 848, 851 (D.C.
ements to the questio
First, the language of t
ties intend to confer ri
the compacting nation
States Dep't of Interior,
J., concurring). Secon
course may be had to
ecution. . . ." *Sei Fuji*
P.2d 617, 620 (1952). A
cludes that Article 47
ganization of America
executing; it was "not
government." *Diggs v.*
Cir. 1976).

Article 47(a) is no
intention to create a
rights. The article rea
struction. Article 47
Member States will ex
with their constitution
ercise of the right to e
promissory language
implementing legislati
form a particular act,
advance the cause of e
provide free public e
within the country. Th
amended Charter of t
non self-executing tre
consistent state laws.[1]

B. Section 21.031 a

The Constitution e
the President and t
trudes into or interfe
cannot stand. The pl
be invalidated under t

VI, cl. 2, bec
eign policy. '
and the expa
of our foreig
are evidence
tive support
rights.[120]

The twent
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[1971] I.C.J.
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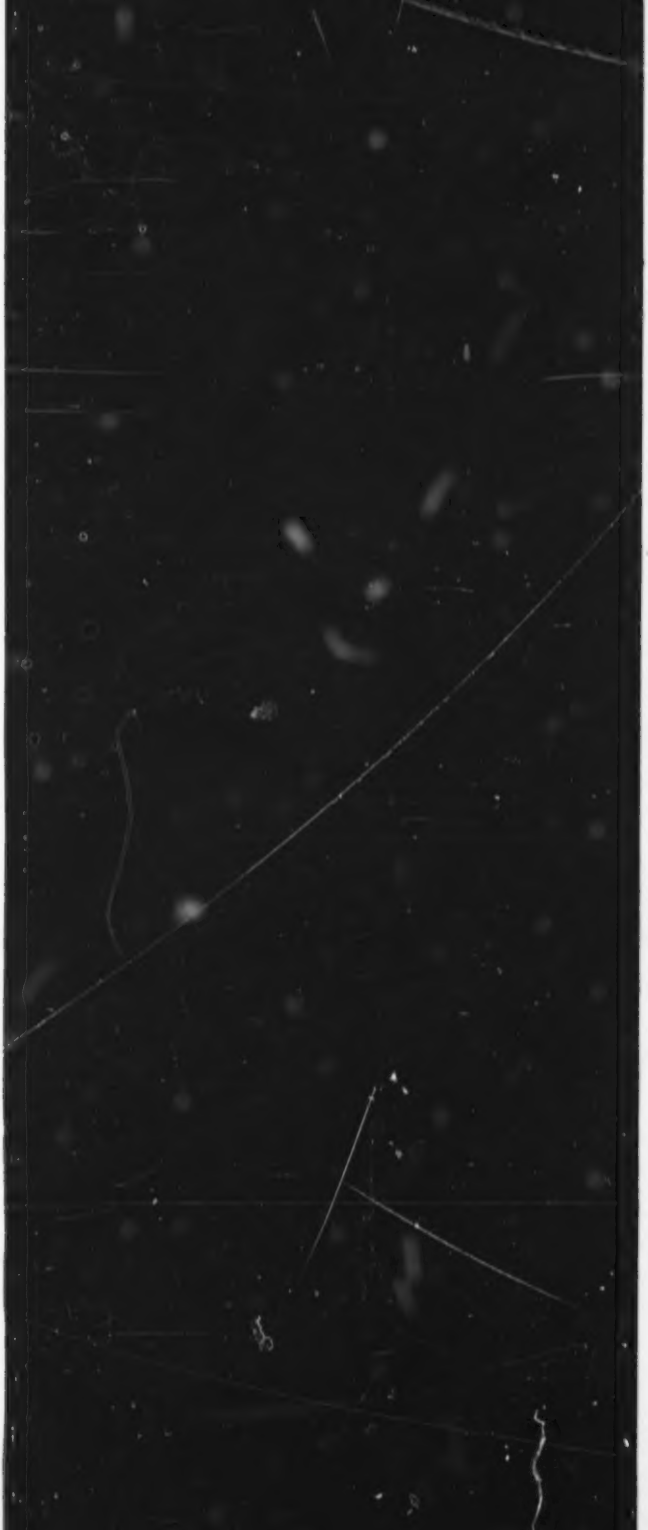

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vision, it dem
which we hav
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of provision f
ered. This is
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the United St
Miller, 389 U
Nonetheless,
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activities trac
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or ratified.

Article 31
rights recogn

Article 31

To accelerate their economic and social development, in accordance with their own methods and procedures and within the framework of the democratic principles and the institutions of the inter-American system, the Member States agree to dedicate every effort to achieve the following basic goals:

a) Substantial and self-sustained increase in the per capita national product;
b) Equitable distribution of national income;
c) Adequate and equitable systems of taxation;
d) Modernization of rural life and reforms leading to equitable and efficient land-tenure systems, increased agricultural productivity, expanded use of undeveloped land, diversification of production; and improved processing and marketing systems for agricultural products; and the strengthening and expansion of facilities to attain these ends;
e) Accelerated and diversified industrialization, especially of capital and intermediate goods;
f) Stability in the domestic price levels, compatible with sustained economic development and the attainment of social justice;
g) Fair wages, employment opportunities, and acceptable working conditions for all;
h) Rapid eradication of illiteracy and expansion of educational opportunities for all;
i) Protection of man's potential through the extension and application of modern medical science;
j) Proper nutrition, especially through the acceleration of national efforts to increase the production and availability of food;
k) Adequate housing for all sectors of the population;
l) Urban conditions that offer the opportunity for a healthful, productive, and full life;

m) Promotion of private initiative and investment in harmony with action in the public sector; and
n) Expansion and diversification of exports.

Without in any way disparaging the admirable goals represented by Article 31, the court concludes that the President and the Congress did not enter into this treaty as an act of foreign relations which displaces inconsistent state law. Article 31 also should not be used by the judicial branch as a test for all state and federal statutes which touch on the subjects embraced by the Article. If signing a treaty necessarily had the effect of displacing inconsistent state and federal laws, the question of whether a treaty was self-executing and thus had the effect of domestic law would be unnecessary.

The reservation made by the Senate when ratifying the Charter supports the conclusion that it was not an act of foreign policy ousting the states' ability to interfere with the achievement of the goals established in the Charter.

> [T]he Senate gives its advice and consent to ratification of the Charter with the reservation that none of its provisions shall be considered as enlarging the powers of the Federal Government of the United States or limiting the powers of the several states of the Federal Union with respect to any matters recognized under the Constitution as being within the reserved powers of the several states.

The Charter of the Organization of American States is not a superior federal policy to which state law must yield when it impairs the policy represented by that Charter.

The court's analysis of the effect of the signing and ratification of the Charter of the United Nations proceeds along the same lines. Articles 55 and 56 of the Charter state:

> *Article 55*
>
> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, a conditions of economic and social progress a development;
b. solutions of international economic, social, healt and related problems; and international cultu and education cooperation; and
c. universal respect for, and observance of, hum rights and fundamental freedoms for all witho distinction as to race, sex, language or religion

Article 56

All Members pledge themselves to take joint a separate action in cooperation with the Organiz tion for the achievement of the purposes set forth Article 55.

The Universal Declaration of Human Rights, G. 217A, 3 U.N. Doc. A1810 (1948), was adopted unani by the U.N. General Assembly with active support a ticipation in its drafting, in 1948. The Universal Decl is considered an authoritative interpretation of Artic the U.N. Charter. Article 26 of the Universal Decl states:

1. Everyone has the right to education. Educati shall be free, at least in the elementary and fu damental stages. Elementary education shall compulsory. Technical and professional educati shall be made generally available and higher ed cation shall be equally accessible to all on the sis of merit.
2. Education shall be directed to the full dev opment of the human personality and to strengthening of respect for human rights a fundamental freedoms. It shall promote und standing, tolerance and friendship among tions, racial or religious groups, and shall furth the activities of the United Nations for the ma tenance of peace.
3. Parents have a prior right to choose the kind education that shall be given to their children

Once again, to determine whether the United Na Charter in conjunction with the Universal Declaration meant as an exercise of the power over foreign affairs useful to examine other provisions which must stand o same footing. Article 24 speaks of the right to "periodic days with pay." Article 25 establishes that

> Everyone has the right to a standard of living ade quate for the health and well-being of himself and o his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Article 27(a) provides for "the right to the protection moral and material interest resulting from any scientifi erary or artistic production of which he is the author."

Like the goals set forth in the amended Charter of th ganization of American States, these are admirable p ples. They represent standards toward which all soc should strive, and, because of our relative prosperit should achieve. Holding those principles in high esteem not mean that the City of Houston could not constituti decline to provide its workers with paid vacations or th State of Texas intrudes into foreign relations if it de person the right to education. Indeed,

> As the General Assembly neared its final vote o the Declaration, Mrs. Franklin D. Roosevelt, as th Chairman of the Commission on Human Rights an a representative of the United States in the Assen bly stated:
>
> In giving our approval to the declaratic today, it is of primary importance that we kee clearly in mind the basic character of the documen It is not a treaty; it is not an international agre ment. It is not and does not purport to be a stat ment of law of of legal obligation. It is a declaratic

of basic principals of human rights and fr
be stamped with the approval of the G
sembly by formal vote of its members, a
as a common standard of achievement f
ples of all nations.

5 Whiteman, Digest of International Law 24
although the United States is obligated to pr
to education as an integral part of the "human
damental freedoms" guarded by the U.N. Cha
are not interfering with federal foreign policy
terfere with that obligation.

The plaintiffs also point to other internatio
which support their position that the right
universally recognized. The American Dec
Rights and Duties of Man, O.A.S.O.R., O.E.
23, doc. 21., Rev. 2 (English 1975); The Inte
nant on Economic, Social, and Cultural Ri
2200 A (XXI) (1966); The International Cove
Rights, O.A.S.T.S. No. 6, at 1, O.A.S.O.R.,
V/II, 23, Doc. 21, Rev. 2 (English 1975); The
the Rights of the Child, G.A.Res. 1386 (1959
rights instruments recognize the right of all
acy or to a free primary education. The plaint
the emphasis by the current administration
tional recognition of all human rights. That t
undocumented children the right to educatio
critical; it is not an impermissible interferenc
er to conduct foreign relations.

There is no recorded decision which holds
recognition of human rights, by itself, prev
from interfering with the enjoyment of th
cases on which the plaintiffs rely were reso
narrower basis.

In *Zschernig v. Miller*, 389 U.S. 429 (196
Court struck down an Oregon statute whic
non-resident's right (legal, not human) to inh
Oregon on the satisfaction of three requirem

(1) The existence of a reciprocal right of a U States citizen to take property on the same t as a citizen or inhabitant of a foreign country;

(2) The right of United States citizens to re payment here of funds from estates in a fo country; and

(3) The right of the foreign heirs to receiv proceeds of Oregon estates "without confiscati

Id. at 430-31. Superficially, this statute was an e Oregon's legitimate power to regulate descent and tion. The manner of application of the statute, hov vealed that Oregon used it as a vehicle to launch

> inquiries into the type of governments that o in particular foreign nations—whether aliens t their law have enforceable rights, whether th called "rights" are merely dispensations tu upon the whim or caprice of government offi whether the representation of counsels, ar sadors, and other representatives of foreign na is credible or made in good faith, whether th in the actual administration in the particular fo system of law any element of confiscation.

Id. at 433. This "search for the 'democracy quotien eign regime" was interference with foreign policy ditional sense: the Oregon courts used the statute the validity of foreign governments.

Similarly in *United States v. Belmont*, 301 U.S. the Court held that New York could not undermin tion a compact between the United States and Union. This principle was reaffirmed in *United Stat* 315 U.S. 203 (1941). The Court stated that the Nev icy "refuses to give effect or recognition in New Y of the Soviet Government which the United States icy of recognition agreed no longer to question." *I*

This case does not involve a state policy which the validity of a foreign government. There is no b clude that the statute is an irritant to a foreign sta

Mexico. Any conflict between section 21.(relations with Mexico is insubstantial. *Cf Social Sers. v. Dublino*, 413 U.S. 405, 42

The strongest suggestions that our in for the recognition of human rights invali which undermine the observance of those the concurring opinions in *Oyama v. C* 633 (1947). In *Oyama*, the Supreme Cou ifornia statute which prevented aliens i ship from acquiring, owning, occupying, ring agricultural land. Although the majo mention the Charter of the United Na concurring opinions referred to the tr stated:

> we have recently pledged ourselve with the United States "to promo sal respect for, and observance of, and fundamental freedoms for all v tion as to race, sex, language, or reli this nation be faithful to this interna state laws which bar land ownership by aliens on account of race are p enforced?

Id. at 649-50. Justice Murphy added that

> this nation has recently pledged itse United Nations Charter to promote observance of, human rights and fu doms for all without distinction as t guage and religion. The Alien Land a barrier to the fulfillment of that r Its inconsistency with the Charter, duly ratified and adopted by the is but one more reason why the s condemned.

Id. at 673. In answer to Justice Black's believes that we cannot fulfill our natio tions at home are inconsistent with the p

abroad, and that statutes which stand as
fillment should be condemned. Nonethel
conclude that those concurring opinions
principles which they promote provide t
ognition of justiciable rights which ser
well as condemn, inconsistent state law.

The conduct of foreign affairs in our sy
considered separately from the treaty
grown to embrace all areas that may be
ternational community. The constitution
authority to conduct foreign affairs en
speak with one voice in our dealings w
ments and international organizations. T
absence of the exercise of the power to n
the effect of domestic law, has not evo
states from enacting laws which may aff
national concern. The federal governmer
validate a state law such as the one chal
by entering into a self-executing treaty
menting legislation. That has not occurr
pledge to which Justice Black has referre
or rights by our government do not ma
treaty power irrelevant.

C. CUSTOMARY INTERNATI

In *The Paquete Habana*, the Supreme C

> International law is a part of our la
> ascertained and administered by th
> tice of appropriate jurisdiction, as
> tions of right depending upon it are
> for their determination. For this
> there is no treaty, and no controlli
> legislative act or judicial decision,
> had to the customs and usages of c
> and, as evidence of these, to the
> and commentators, who by years of
> and experience, have made thems
> well acquainted with the subjects

> treat. Such works are resort
> bunals, not for the speculation
> cerning what the law ought to
> thy evidence of what the law
>
> . . . .
>
> This review of the preceden
> the subject appears to us a
> strate that at the present da
> sent of the civilized nations o
> pendently of any express trea
> it is an established rule of int
> ed on considerations of hum
> industrious order of men, and
> nience of belligerent States,
> sels, with their implements
> and crews, unarmed, and ho
> peaceful calling of catching
> fish, are exempt from capture

175 U.S. 677, 700 (1900). The plain
treaties, agreements, declaration
construed as customary internati
rule of decision in this case.

As should be clear from the for
that the right to education, while
international goal, has not acquire
al law. This conclusion is founde
tional law.

> The traditional view of inte
> establishes substantive prin
> whether one country has wr
> of its peculiar nation-to-nati
> method for an individual to
> local remedies and then rep
> thorities of his own state to
> pion his claim in diplomacy
> tional tribunal.

Banco Nacional de Cuba v. So
(1964). In an earlier case, the Su

> In these circumstances, no q
> law, or of the extent of the
> States in its international re
> ternational law is a part of
> the law of all States of the U
> of our law for the applicatic
> and these are concerned w
> and duties and not with dor

Skiriotos v. Florida, 313 U.S. 6

Aliens may have a better cla
right to education than citizens.
ally comprehends a nation's tre
which adversely affects an alien
vene customary international l
United States is neglecting its
rights or to exert the greatest e
opportunities, an alien's gover
States to answer before an int
court, the plaintiffs have not sh
arising from customary internat

V. CONCL

The ruling of the court is not b
ties, federal legislation, or the p
tions. The immigration status
determinant. It is education th
case. Absent sufficient justificati
permit the states to deny acces
group of children within its bor
to provide public education.

It is well that the importance
gal premise for our result, for it
erations which, although not ce
to the legal analysis, confirm t
statute. The evidence introduce
that, with the hope of saving so
creating an enormous public cos
be borne in the not so distant fu

One fact remains free f
jority of the undocumente
be excluded from the pu
statute are or will becom
try. By denying them a
most of them will becom
Edward McCarthy testifi

> We are keeping cert
> are manufacturing n
> to our society ten an
> now. . . . We are m
> ignorant in society is
> productive means fo
> into a state of crime.
> in the form of mode
> lic school operating
> cost . . . fifteen yea
> bill. . . .[123]

It is, of course, the prer
saddle the public with su
they do so in conformanc
have not done.

Another aspect of this
a country which is re-ex
home for persons of all n
forget the role that the p
unity to our community
do not fractionalize into
shared goals and ideals,
tions must work to prot
working toward comm
must continue to assur
public school. We must
more perfect union and
Our endeavor to create
deny a discrete group of
individuality. The public
that development. As J.

> The schools can at be
> task that concerns ev
> ciety. For if the deve
> most comprehensive
> proceeded by a deep
> nity, formal educatio
> insure either condit
> more and more exp
> bulwark against the
> dardization, ruthless
> threaten us today.

J. G. Gray, The Promise

challenged in this proc
breach this bulwark or t
children are destined to p

These practical concern
of the constitutional iss
they do highlight the rea
access to education is a
cation not only is closely
ideas and information, it
conditions which make lif

The court will enter a
Commissioner of Educat
031(a) - (c) of the Texas E

The Clerk shall file th
counsel for all parties wit

DONE at Houston, Te

[1] In order to prom
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[2] The plaintiffs al
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school districts the
alien." Any inquiry
company that deci
Each school distri
would serve no pu
Texas Education A

[3] These actions w
1797, filed Septembe
filed September 27,
November 6, 1978;
tember 22, 1978.

[4] Doe v. Wright,

[5] Roe v. Holm, M

[6] Four tag-along
Texas have since be
Rules of Procedure
Rule 9(B), Local
Southern District
Wheeler, C.A. H-
Meyer, C.A. H-79-
C.A. H-79-1928, fi
H-79-2071, filed Oc
the Eastern Distri
Those cases are as
October 29, 1979;
1979; Doe v. Ford
Horn, TY-79-338-C
P-79-234-CA, filed
449-CA, filed Dece

[7] On December 2
this court the issu
Judicial Panel on
these cases for suc
ceedings. It woul
motion for a chan
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1404(a). *But see B*
F.Supp. 828 (S.D.N
ployment Relations
bany). Neither the
however, would be
one controlling issu
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this court. 15 C. W
Procedure: Jurisdic
consent.

[9]The State's moti
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Similar motions ha
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vided by some of th
Vol. XII, 2066-67.

[9]When the Judici
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ing, their order rec
were not identical

[10]The hearing in
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this proceeding are
the statute in a sin

[11]The court origi
necessary. *See* Ma
rarely necessary, f
which declaratory
facial unconstitutio
This observation is
Manual for Comple
Consideration of t
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is appropriate. Ind
in support of the p
v. Northern States
was vacated with i
presumably becaus
lenged rules and
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nally, "[i]f the prer

a court may not deny class status because there is no 'need' for it." *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972). The court concludes that rationale should be followed in cases not subject to Rule 23(b)(3).

[12]The Mendoza children originally sought to represent a class of children in the geographic area of the Goose Creek Consolidated Independent School District. During and after the hearing in this cause, the Mendozas' counsel requested certification of a state-wide class.

[13]Tex.Educ.Code Ann. tit. 2, § 21.031 (Vernon 1972).

[14]Tex.Educ.Code Ann. tit. 2, § 15.01(b) (Vernon 1972) states that the available school fund "shall be apportioned annually to the several counties of Texas according to the scholastic population of each. . . ." Section 15.01(c) defines the term "scholastic population" as "all pupils within scholastic age enrolled in average daily attendance the next preceding scholastic year in the public elementary and high school grades of school districts within or under the jurisdiction of a county of this state." After the Texas Education Code was amended to exclude aliens who were not "legally admitted," undocumented children who were permitted to attend public schools were no longer counted in the computation of average daily attendance. Record, Vol. VIII, 300; Plaintiffs' Exhibit No. 286.

[15]The Attorney General's Opinion was based on legislative intent and a plain-meaning construction of the statute. The Attorney General stated that "the words 'every' as contained in section 21.031 of the Education Code do not permit exceptions to be created by local boards." Att'y Gen. Op. H-586 at 3 (1975). The Attorney General's Opinion also stated: "Whether the Legislature itself may establish an exception for illegal aliens has not been decided by the higher courts. While we recognize that the United States Supreme Court could sustain an exercise of legislative power, the existing case law indicates that the rights of illegal aliens are protected by 42 U.S.C.A. section 1981 and the Fourteenth Amendment to the United States Constitution." The Attorney General concluded that "[u]nder section 21.031 of the Education Code, alien children within the State are entitled to attend public school in the district of their residence, regardless of whether they may be 'legally' or 'illegally' within the United States.

Two previous Attorney Generals' Opinions have held that alien children had the same right to attend public free schools as do the children of citizens. Attorney General Opinion No. 2318, Book 55 at 338 (1921), reached that conclusion construing Articles 2899 and 2900 of the Texas Revised Civil Statutes of 1911. Those statutes contained language almost identical to that used in the Texas Education Code prior to September 1, 1975. Attorney General Opinion 0-2318 (1940) stated: "We therefore conclude that the Legislature of this State intended that an opportunity for instruction in the public schools of this State should be

afforded the youth of Texas, and the advantages of attending a public school should be extended to all children *regardless of their nationality* or color, *whether citizen or alien*; . . ." [emphasis added]

[16]Plaintiffs' Exhibit No. 448 at 5.

[17]The plaintiffs introduced as evidence a stratified random sample of the Texas Independent School Districts. Sixty school districts were randomly selected. Twenty-nine school districts were selected with a student enrollment of 10,000 or more and 31 school districts were selected with a student enrollment of less than 10,000. Of the 1,099 school districts, 59 have a student enrollment of greater than 10,000. Of the school districts contacted which had an established policy regarding the admission of undocumented children, 72.9 percent of those school districts responded that they would either exclude all undocumented children or admit them upon payment of tuition. Plaintiffs' Exhibit No. 448 at 6.

[18]The court notes, however, that there has been evidence in the Tyler Independent School District of children attending as tuition paying students. *Doe v. Plyler*, 458 F.Supp. 569, 575 & 581 (E.D.Tex. 1978).

[19]The court cannot state with absolute certainty what the Legislature intended when passing the amendment to 21.031. Neither the court nor the parties have uncovered a shred of legislative history accompanying the 1975 amendment. There was no debate in the Legislature before the amendment was passed by a voice vote. There were no studies preceding the introduction of the legislation to determine the impact that undocumented children were having on the schools or to project the fiscal implications of the amendment. This supports the conclusion that the amendment contemplated the exclusion of undocumented children from the public schools and is not merely a change in the manner of computing average daily attendance.

[20]Much has been said and written of late about whether the Supreme Court has abandoned the two-tier approach. Whether or not an "intermediate tier" is now clearly established, *see Chatham v. Jackson*, 613 F.2d 73, 80 (5th Cir. 1980), it is possible to state with some certainty that the rational basis test has become somewhat flexible. *See infra* at 44-45.

[21]In *Ambach v. Norwick*, __U.S.__, __n.7, 99 S.Ct. 1509, 1595 n.7, (1979), the Court stated that *Rodriguez* held that "access to education is not guaranteed by the Constitution." *Rodriguez*, however, did not in any way involve the issue of access to education. *Rodriguez* centered on equality of expenditure, not access.

[22]Two measurements, stock and flow, are utilized by experts to determine the population of undocumented aliens residing in the United States. The term "stock" refers to the total number of undocumented aliens who enter this country illegally and intend to remain perma-

nently, while "flow' refers to the total number of undocumente
sons who enter illegally on a yearly basis for temporary or se
employment. Dr. Gilbert Cardenas testified that it is these se
and temporary undocumented aliens who comprise the bulk of t
prehension statistics of the Immigration and Naturalization S
(I.N.S.). Many are caught within seventy-two hours after they
the United States and some will cross the border as often as t
times in one year. Record, Vol. I, at 68-71; Plaintiffs' Exhibit N
at 12-13. Additionally, Dr. Jorge Bustamante, the foremost exp
Mexican migration, testified that only nine percent of the total
undocumented aliens are likely to remain in the United States
ord, Vol. III, 426, 430-31; Defendants' Exhibit No. 14-6, Hansen
Migration, Mexican Workers in the United States and European
Workers" 108.

[23] The court heard the following testimony from Leonel J. C
formerly the Commissioner of the United States Immigratio
Naturalization Service:

> Q. You indicated a little earlier on that you felt that in esse
> United States had already granted an amnesty to undocu
> persons in the United States. Could you expand on that t
> a little, please?
>
> A. What I said was that there is a de facto amnesty, certainly
> official policy. But when you contend with immigration an
> mentation in the state of New Mexico with three investi
> for the entire state, you have to come to the conclusion th
> are not going to deport everybody in New Mexico who c
> deported. That's what I mean by the de facto situation. F
> when the number of investigators is reduced by one-tenth
> year's budget, you have to come to the conclusion that it s
> be a de facto situation, but the efforts to root them out ar
> to be much more difficult.

Record, Vol. VI, 49-50. The Court notes that Congress recen
authorized additional personnel for I.N.S. It is doubtful that th
plement would alter Mr. Castillo's assessment.

[24] In *Doe v. Plyler*, 458 F.Supp. 569, 581 n.14 (E.D.Tex. 1978)
Justice stated:

> It is no answer to the *Rodriguez* dictum that the ability
> illegal alien children to exercise free speech and participa
> in the political process is of no concern to the State of Texa
> These children, and many more like them, are likely to r
> main here. . . . The federal government has chosen, eith
> by act or omission, not to deport them. Many of them ha
> younger siblings who are American citizens and who m
> some day be the means of legalizing the presence of t

whole family. Developments in federal immigration policy, such as President Carter's proposed amnesty plan, may legalize their status at a much earlier date. As the Supreme Court has recognized, the benefits of education are not reserved to those whose productive utilization of them is a certainty: "[a]lthough an alien may be barred from full involvement in the political arena, he may play a role—perhaps even a leadership role in other areas of import to the community." *Nyquist v. Mauclet*, 432 U.S. 1, 12, 97 S.Ct. 2120, 2127, 53 L.Ed.2d 63 (1977).

[25] A student commentator has stated that

> The "entry" doctrine . . . [is] understandable only as a way to balance important competing policies—the constitutional guarantee of due process to all "persons" within its jurisdiction versus the constitutional commitment to Congress of foreign policy and the related admission of foreign nationals to the United States shores. Thus, the Court has not allowed Congress arbitrarily to deprive resident aliens of life, liberty, or property. The Court has deferred to congressional decisions on the conditions which trigger expulsion of an unnaturalized alien, but has required procedural due process in deportation. This combination of policies strikes a balance between the Court's acknowledging the congressional right to set terms of admission and expulsion, and fulfilling its own responsibility to insure fundamental fairness to any person within the shelter of the Constitution. Finally, the Court has abdicated entirely when Congress excludes an alien still at the threshhold or its legal equivalent *i.e.*, parole, and has justified the fictional entry doctrine as a device which allows Congress to be humane in emergencies (medical or political) and to release excludable aliens from custody without losing any flexibility in deciding whom to admit. In sum, the Constitution, in particular the fifth and fourteenth amendments, protects those within American territory. The Court usually sanctions dilution of those guarantees only to the extent necessary to preserve congessional control over the admission and expulsion of foreign nationals.

Comment, 16 Hou.L.Rev. 667, 706 (1979).

[26] Record, Vol. VII, 98-142.

[27] Record, Vol. V, 687.

[28] Record, Vol. VII, 156.

[29] Record, Vol. VI, 12-16; Vol. VII, 155.

[30] Record, Vol. VII, 105-09.

[31] Record, Vol. IV, 594.
[32] *Id.* at 612.
[33] Record, Vol. XI, 1256-68. *See Also* Plaintiffs' Exh
[34] Record, Vol. II, 222. In addition Dr. Carter's testi

> [W]e can very well say with perhaps a few indivi
> tions that [an excluded] child would be illiterate
> unable to read and unable to write. The child
> miss much of the . . . social training relative t
> the customs, the procedures, the organization
> ciety; that aspect of the formal [socialization] c
> would be missing. [These children] would prob
> able, with the lack of these skills, to integrate
> into the society as productive members of societ
> sibility of an illiterate person [growing] up and
> at anything but marginal social levels in this soc
> trial, technically advanced society is very hard
> He or she would be unable to complete the mos
> tary forms of application for work, which would
> individual to those kinds of jobs that would requi
> ing, etc. As you know, these kinds of jobs are di
> in our society. Cognatively, the child would be
> to cope with modern industrial society. *Id.* at 22

[35] Record, Vol. II, 287-89. *See also* Record, Vol. VI
[36] Record, Vol. X, 1171-75.
[37] Plaintiffs' Exhibit No. 288. *See generally* Record,
1179, 1180-81 & 1184-87.
[38] Professor Tribe has described the right to fair an
sentation as a qualitative aspect of the right to vote.
can Constitutional Law § 13-7 (1978). The court, h
that apportionment schemes which cancel or minimize
of cognizable population groups elicit strict scrutiny o
ture of the population group compels it. Thus racial a
by themselves deserve special solicitude without
qualitative aspect of the right to vote. *Compare Gaffn*
412 U.S. 735 (1973), *with White v. Register*, 412 U.S.
[39] The statute excludes alien children who are
mitted." This expression, perhaps as a result of the
plexity of our immigration laws, is a monument t
Texas Education Agency, however, has promulgated
implementation of section 21.031 in Rule 26.51.01.010
February 29, 1980.
[40] The court notes that undocumented status is no
which an individual cannot control. Uncontrollable c
those which bear no "relationship to individual respo

doing." *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 1
though undocumented persons may be powerless to c
diately their status *to* that of a resident alien or that of a
United States, undocumented *adults* have control and
sponsibility for their present status. Further, citizens an
iens may be distinguished for undocumented aliens with
ing them. A distinction should not be stigmatizing wh
difficult to make the distinction required without referenc
acteristic giving rise to that distinction. Describing pe
documents as undocumented or illegal does not constitute
stereotyping which relegates those described to inferiori
ally Regents of the Univ. of Cal. v. Bakke, 438 U.S. 2
(Brennan, White, Marshall & Blackmun, JJ., concurrin
in part and dissenting). Otherwise, any classificatory sch
scribes persons in an undesirable way would be suspect
ernments restrained in their ability to regulate.

[41] In *United States v. Carolene Products Co.*, 304 U.
Justice Stone's now well-known fourth footnote sugge
crimination "against discrete and insular minorities ma
condition, which tends seriously to curtail the operation
cal processes ordinarily to be relied upon to protect m
which may call for a correspondingly more searching ju

[42] In *Matthews v. Diaz*, 426 U.S. 67, 80 (1976) the S
stated that illegal entrants do not have "a colorable
claim" to benefits provided to citizens by the federal gov
Court reasoned that the control of immigration and nat
Congress permitted flexibility in establishing the condit
sion. This does not imply that the states have co-equal
can impose burdens on persons whom the federal gover
or permits to remain in this country. States may exclu
offices or functions to protect the basic concept of a po
nity. *Ambach v. Norwick*, __U.S.__, 99 S.Ct. 1589 (1
Connellie, 435 U.S. 291 (1978); *Sugarman v. Dougall*,
(1973).

[43] The Supreme Court has construed the due proces
quiring equal protection of the laws. *Bolling v. Sharpe*
(1954). The application of the guarantee of equal protec
differs when classifications are created by the state an
ernments. Thus,

> The federal sovereign, like the State, must gove
> tially. The concept of equal justice under law is s
> the Fifth Amendment's guarantee of due process,
> by the Equal Protection Clause of the Fourteenth
> ment. Although both Amendments require the s
> of analysis, see Buckley v. Valeo, 424 U.S. 1 (1

> Court of Appeals correctly stated that t
> are not always co-extensive. Not only do
> the two Amendments differ, but more
> may be overriding national interests whi
> federal legislation that would be unacce
> vidual State. On the other hand, when a
> plicable only to a limited territory, such
> Columbia, or an insular possession, and
> special national interest involved, the D
> has been construed as having the same
> Equal Protection Clause.

Hampton v. Mow Sun Wong, 426 U.S. 88, 100

"Judicial deference to federally created dist
is due in part to the political character of the
Fong Yue Ting v. United States, 149 U.S. 698
tion does not render "federal power over alie
any agent of the National Government may ar
dent aliens to different substantive rules
citizens." *Hampton v. Mow Sun Wong, sup*

[45] This conclusion is bolstered by the court's
Bica, 424 U.S. 351 (1976). *De Canas* held th
power to regulate immigration did not pre-e
prohibiting employment of undocumented pe
nas did not involve the applicability of the eq
undocumented persons, "[t]he Court used eq
ogy to find that protection of the state's lawf
and economy were 'vital state interests,' and
'tailored to combat effectively the perceived
Rev. 1069, 1081 (1979). If the Court's findings
protection context, they would refute the cont
documented persons is suspect.

[46] A student note has suggested that the app
cess clause is not a basis to infer that undoc
tected by the equal protection clause.

> Under due process of law certain indivi
> tected from unfair or mistaken depriv
> where minimum procedural safeguards
> Under equal protection of the laws in
> protected from arbitrary deprivation by
> legitimate state purpose is found to be a
> thereby. The difference in focus betwe
> equal protection inquiries demands caut
> equal protection guarantees through th
> isting due process rights, particularly
> addressing the issue with regard to a gr

> in this country is contrary to laws promul
> thority of the Constitution. Due process ri
> aliens to insure they are not deprived of in
> erty or property without adequate proced
> Such constitutional guarantees do not au
> rise to a like result for the protection of i
> titlement to state benefits under equal p
> laws.

Note, 11 St. Mary's L.J., 549, 562-63 (1979). I
court would extend equal protection guarantees
of pre-existing due process rights . . .," nor sug
tees of due process "automatically give rise to
illegal aliens' entitlement to state benefits. . . ."
tinctions between the two clauses should not b
that are safeguarded but on the persons protect
The due process clause protects certain kinds
those that inhere in the right to life, liberty, o
protection clause guarantees equal treatment
the absence of sufficient justification. Neither t
guarantees equal treatment by the government
cient justification. Neither the due process clau
nor the equal protection clause creates substant
cal to argue that the rights protected by the due
not determine which persons are protected by
clause. Analysis which focuses on the rights
provisions sorely misapprehends the issue w
aliens are protected by the equal protection clau

[47] The equal protection clause may not prohibit
non-residents or against non-resident aliens. *Se*
389 U.S. 429, 459 n.26 (1968) (Harlan, J., conc
Clung, 172 U.S. 239, 260-61 (1899). Such discrim
be unconstitutional because of other constitutio
the privileges and immunities clause, the power
commerce, and the foreign relations power.

[48] A recent interpretation of a civil rights statu
sition that the equal protection clause protects
In *United States v. Otherson*, 480 F.Supp. 1369
**United States Border Patrol Agents were pr
mistreating and assaulting several undocumer**
held that the undocumented aliens were "inh
Territory, or District" within the meaning of
court reasoned that the term "inhabitants" is sy
pression "any person within the jurisdiction." A
legislative history of the Reconstruction civil
fourteenth amendment reveals that Congress i

civil rights of any person within th
congruous for an undocumented alie
statute based on the equal protect
amendment, and yet not be covered
the clause itself. *Otherson* along wi
documented aliens are protected by
ple justification for maintaining the
42 U.S.C. §§ 1981 & 1983 and 28 U.

[49] Defendants' Exhibit No. 6-1 at

[50] *See* Plaintiffs' Exhibit No. 448.

[51] Plaintiffs' Exhibit No. 448.

[52] Plaintiffs' Exhibit No. 207 at 70.

[53] Plaintiffs' Exhibit No. 210 at 35.

[54] Plaintiffs' Exhibit No. 12 at 25.

[55] Record, Vol. I, 80-83; Vol. III, 4
Plaintiffs' Exhibit No. 207 at 6-7. T
that "aliens, like citizens, must pay
Diaz, 426 U.S. 67, 83 n.22 (1976).
mented persons should pay tuition
costs of education is nonsense. *See*
365, 376 (1971) ("There can be no 's
nues to which aliens have contribut
dents of the state.")

[56] *See supra* 25-27.

[57] Although the state does not mo
that those who cannot afford the tui
can turn to the private schools. *See*

[58] Illegal entry is a misdemeanor f
for subsequent commissions. 8 U.S.
alien is a felony. 8 U.S.C. § 1326.

[59] Record, Vol. VII, 1-33; Plaintiff

[60] Record, Vol. VII, 49-50.

[61] Record, Vol. XI, 1272-73, 128
hibit No. 3 at 259-60.

[62] Record, Vol. XI, 1274.

[63] Plaintiff-Intervenor's Exhibit
Raul Besteiro, the Superintendent
testified that the problems his sch
result of an influx of documented c
of financing education in Texas, his
sufficient classroom space.

[64] Tex.Educ.Code Ann. § 16.004
2062-67.

[65] Record, Vol. X, 1217. *See Arre*
(S.D.Tex. 1979).

[66]As noted above, some school distr
undocumented children prior to 1975.

[67]Record, Vol. XXI, 86; Vol. III, 471.

[68]*See* Defendant's Exhibit No. 2-1.

[69]*See* Record, Vol. XIII, 2297-98. *See*
which shows an undocumented popula
128,340 while Defendants' Exhibit No.
Hispanic population in 1980 of 111,284.

[70]Record, Vol. XXI, 56, 87, 95, 102-03

[71]Plaintiff's Exhibit No. 443. This re
because application of Criterion's meth
residual of only 71,004. It is rather ab
sidual greater than the combined resi
blacks.

[72]This is a result of the methodology
two independent data bases: one for the
17; and one for TEA enrollment data. A
rion study simply increased the census
tion to the increases found in annual T
Vol. XVII, 97. This necessarily resulte
tern of "residual" difference that existe
ord, Vol. XXI, 93-94. Thus, the numbe
children" simply increases in proporti
school enrollment.

[73]*See* Record, Vol. XXI, 64; Plaintiffs

[74]Record, Vol. XXI, 66, 131, 134.

[75]Record, Vol. XVI, 65, 69.

[76]Record, Vol. XXI, 72, 102-03, 136.
census enrollment data and shows that
glos, and 55,969 Blacks are out of scho
adjusts TEA data to exclude students
comparable with the census data. This
sidual of 119,884 and a Black and Anglo

[77]Record, Vol. XX, 31; Vol. XVIII, 3
30.

[78]See Record, Vol. XXI, 101; Vol. X
No. 400, 418 & 442.

[79]Record, Vol. XXI, 56. This may be
ducted the study was not a demographe

[80]The court does not suggest that any
accurate. It is noteworthy that
"Hispanics" differently. Record, Vol
not surprising that they resulted in di

[81]Record, Vol. XVIII, 177.

[82]Record, Vol. XXI, 115.

[53] Record, Vol. III, 421
at 142-43 (Villalpando St
entire San Diego School
at 25-26 (Cornelius Stud
ican nationals reside per
length of stay being 5.5 m
nelius—of those who sta
with them); Defendant
Study—of those undocu
manently in the United
children); Defendant's
total undocumented imm
stock, only 3.7 percent h
No. 14-19 at 10-11; (U
documented people inte
children enrolled in sch
children whose parents
greater. The Van Arsd
who are citizens; the
General shows that 6.6
have children in schools
children are counted.

[54] The legislative histo
implies that the State i
migration. The sponsor
would serve "to make it
Mexico to attend schools
meeting, hearing on HR
likely that similar conce

[55] Record, Vol. III, 42

[56] Record, Vol. I, 104-

[57] The State has sugg
§ 42800, *et seq.*, inhibit
Prior to July 1, 1978,
public instruction to ad
perintendents to list un
submit the list to the bo
quired to forward the li
vice. That law was ame
not currently required t
mented children are en

[58] If the State was ger
illegal immigration or i
tion, a law sanctioning
would do very nicely. L

[89] Record, Vol. XVI, 3511,
ment of the problem shoul
mented children were, for t
been thrown out and the St
them back aboard.

[90] Record, Vol. XXIV, 78-7

[91] Plaintiffs' Exhibit No. 20

[92] Record, Vol. XXIII, 8-9;

[93] Record, Vol. X, 1113; V
204 at 14-15. *See also* Plaint
tive purposes).

[94] Record, Vol. XX, 118-19

[95] Record, Vol. XXIII, 15
the Comptroller's estimate
Record, Vol. XIII, 2252-53.

[96] Record, Vol. XIII, 225
$1,200.00 and $800.00 is ac
which are appropriated as s
the "regular program," but
tory, special and vocational e
gram funds, categorical fun
eral Revenue Fund.

[97] One witness stated: "Fo
the foundation program is p
not recognize the municipal
trict, the water district, th
must be delivered." Record,

[98] Record, Vol. VIII, 170-8

[99] Plaintiff-Intervenor's Ex

[100] Record, Vol. IX, 1046.

[101] The Supreme Court sta
633 (1969), that

> We recognize that a St
> the fiscal integrity of i
> tempt to limit its exp
> tance, public educatio
> may not accomplish su
> between classes of its c
> duce expenditures for
> dren from its schools.

The State contends that u
equal protection under the
tion against undocumented c
ination if founded on bad re

State would rea
the word "citize
[102] In discussi
stated:

> The state i
> riding" [*M*
> *Loving v.*
> *Graham v*
> tant, *Dun*
> stantial,"
> these vari

In Re Griffiths,
[103] The childre
It is important
of the undocum
plaintiffs is und
fied that it is
Service to initi
[104] Like resid
likely to need
undocumented
Plyler, 458 F.S
viously have at
[105] The court
propriate becau
vidual responsi
proach, the me
the achievemer
tionship betwe
pricious and ir
tionality is app
[106] *See Hosie*
excludes undoc
tion clause). *C*
(E.D.La. 1961
cludes childre
irrational).
[107] States are
subject to exclu
667, 693 (1979)
the State from
late; exclusive
federal author
does not pre-e

cordingly, ". . . stat
eral government by
will be totally void
emption, however,
emption implies the
Federal Pre-emptio
to a Public Educatio
(1979).

[108] An examinatio
strates that Congre
islation. To the co
retary of Educatio
program and disbu
which do not compl
& 2836. *See* R. Katz

[109] Record, Vol. I

[110] *Id.* at 1019.

[111] *Id.* at 1013, 10

[112] Defendants' E

[113] Record, Vol. I

[114] *Id.* at 1077.

[115] For a detailed
state's migrant edu
Federal Register, F
grant child is eligib
I Migrant services
"formerly migrator
tory child is a child
within the past yea
agricultural or fishi
who was considere
Record, Vol. IX, 1

[116] Record, Vol. I
ceives more Title I
migrant children ha
appropriation of al
will be allotted to
this money.

[117] The contrary
Marshall, joined by
Services v. Dublin

> It is unnecess
> analysis of t
> does, . . . tha
> tion of preem

> by Congress preclude state attempts to regulate the same subject? There is no question that New York may impose whatever work requirements it wishes, consistent only with constitutional limitation, when it gives public assistance solely from state funds. . . . The question here relates to the conditions that Congress has placed on state programs supported by federal funds. The distinction is not without importance, for it makes inapposite the strictures in our earlier cases and relied on by the court, against lightly interfering with state programs. For we must, of course, be cautious when we prevent a State from regulating in an area where, in the absence of congressional action, it has important interest. Holding that the Federal WIN Program is the exclusive method of imposing work requirements in conjunction with federally-funded programs of public assistance would have no such impact; New York would remain free to operate public assistance programs with state funds, with whatever work requirements it chose.

Even if this dissent was adopted by the Supreme Court, and administrative reconciliation was found not to be preferable to judicial application of pre-emption doctrine, this case is distinguishable. The classic question of pre-emption also is not presented here. Title I is not a federal program which can exist independently of state educational programs. Section 21.031, however, was not promulgated as part of the implementation of the federal legislative scheme. *See id.* at 411 n.9 (opinion of the Court). AFDC, like Title I, is a voluntary program. *See* 42 U.S.C. § 601. A state may choose not to participate in order to avoid federal requirements. Title I, however, unlike AFDC, serves to supplement existing state programs rather than to create ones that are jointly financed. States did not create school systems in order to benefit from Title I. Prior to 1935, support of dependent children was not provided by many states. For example, prior to 1935, the Texas Constitution prohibited the Texas Legislature from granting public money to any individual except indigent and disabled confederate soldiers and sailors and their widows or in the event of a public calamity. Tex. Const. art. 3, § 51. When the federal government enacted the Social Security Act in 1935, the State Constitution was amended. Subsequently, in 1937, the Texas Constitution was amended to authorize subsistence for needy children. *Id.* at § 51(a)(3).

[118] In the pretrial order, the plaintiffs also argued that section 21.031 was pre-empted by the Immigration and Naturalization Act. That issue of law was not addressed in the plaintiffs' final arguments or in their post-trial briefs. In the event that the plaintiffs continue to urge pre-emption on this basis, the court notes that the Immigration and

Naturalization Act does not pre-empt the State law. Except insofar as the statute intends to inhibit immigration, *supra* at 53, it is not an exercise of an exclusive federal power and it is not state legislation in a field occupied by congressional legislation. Further, it stands as no conflict to the federal scheme to deny admission and to deport or to require the voluntary departure of those without documents. If there is a congressional purpose to allow undocumented aliens to enjoy the same benefits as resident aliens while the former are here clandestinely, or not to seek the deportation of children, that purpose is not expressed in a specific provision of federal law. *Jefferson v. Hackney*, 406 U.S. 535 (1972). *See* Note, 14 Tex. Int'l L.J. 289, 297-98 (1979). Moreover, the State's regulations demonstrate efforts to remove any conflict between the state statute and the federal scheme by using federal immigration documents to identify those who are "legally admitted." *See* R.Katz & H.Lenard, The Demise of the Implied Federal Preemption Doctrine, 4 Hastings Const.L.Q. 295, 316 (1977). The use of categories created by federal law may remove the conflict between the state and federal law, but when immigration categories are used, it may be unlikely that those categories are related to a permissible state interest in the context of an equal protection challenge.

[119]The court is aware of other problems with the plaintiffs' position that Article 47 is supreme domestic law. Having reached the conclusion that Article 47 is a non self-executing treaty provision, it is unnecessary to discuss such issues as the effect of the "Brickerlike" reservation made by the Senate at the time of ratification and whether the United States may legislate in the are of human rights through the exercise of the treaty power.

[120]A similar argument was first made by the United States in their briefs in *Shelley v. Kraemer*, 334 U.S. 1 (1948). The government contended that Articles 55 and 56 of the United Nations' Charter, although non self-executing, represented the public policy of the United States. The Supreme Court did not address that argument in their opinion. *See* Note, 36 Va.L.Rev. 1059, 1080 (1950).

[121] For a concise and engrossing description of this trend, *see* E. Murphy, Children of the Eighth Day: The Role of International Lawyers in a Post-Modern World, 13 Int'l. Law. 681, 684-85. The change of emphasis from the nation-state to a broader transnational community is perhaps best illustrated by the difference between the Charter of the League of Nations which emphasizes "the equality and sovereignty of nations" and the Charter of the United Nations which purports to subject nations to a supranational authority.

[122] *See also* S. Bleicher, The Legal Significance of Re-Citation of General Assembly Resolutions, 63 Am.J.Int'l L. 444, 449 (1961) ("According to standard definitions a customary rule comes into existence only when there are acts of states in conformity with it, coupled with a

belief that those acts are required by international law.") (
omitted).

[121] Record, Vol. VII, 124-25.

MANUSCRIPT COVERS

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

IN RE: ALIEN CHILDREN
EDUCATION LITIGATION

STATE OF TEXAS AND
TEXAS EDUCATION AGENCY

Appellants

V.

UNITED STATES

Intervenor-Appellee

AND

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN

Appellees

On Appeal From The United States Court Of
Appeals For The Fifth Circuit

MOTION TO AFFIRM

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Attorneys for Appellees

* Counsel of Record

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A. Undocumented Immigrants Are Entitled To The Due Process And Equal Protection Clauses Of The Fourteen Amendment.

B. Appellants Have Not Articulated A Sufficient Justification To Support The Challenged Statutes . . . . . .

V. CONCLUSION. . . . . .

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2. Brownell v. Shaung, 352 U.S. 180 (1956)

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4. Castillo-Felix v. INS, 601 F.2d 459, 461, 467 (9th Cir. 1979). . . . . .

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13. Frances v. INS, 532 F.2d 268, 272 (2d Ci

14. Green v. Stanton, 451 F.Supp. 502, 570 (N.D. Ind. 1978). . . . . .

15. Heikkila v. Barber, 345 U.S. 229 (1953)

16. Holly v. Levine, 529 F.2d 1294, 1295-6 (2d Cir. 1976) cert. denied 426 U.S. 954

17. In Re: Alien Children Education Litigati 501 F.Supp. 544 (S.D. Tex. 1980). . . .

18. Lalli v. Lalli, 439 U.S. 259, 264 (1979)

19. Levy v. Louisiana, 391 U.S. 68, 70 (1968

20. Mandel v. Bradley, 432 U.S. 173, 176 (19

21. Missouri ex. rel. Gaines v. Canada, 305 U.S. 337, 350 (1939) . . . . . .

CASES

22. Nizanuddowlah v. Bengal Cabaret, Inc., 399 N.Y.S. 2d Cir. 854 (1977). . . . .

23. Noel v. Chapman, 508 F.2d 1023 (2d Cir cert. denied, 423 U.S. 824 (1975). . .

24. Roemer v. Maryland Public Works Board, 426 U.S. 739, 758 (1976) . . . . . .

25. Santa Clara Co. v. Southern Pacific R. 118 U.S. 394, 396 (1886) . . . . . .

26. Sarorgnan v. U.S., 338 U.S. 491 (1950)

27. Shaughnessy v. Pedreiro, 349 U.S. 48

28. U.S. v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979). . . . . .

29. U.S. v. Gordon-Nikkar, 518 F.2d 97 (5th Cir. 1975). . . . . .

30. United States v. Tsuda Maru, 479 F.Su 519 (D.Alas. 1979) . . . . . .

31. Weber v. Atena Casualty & Surety Corp 406 U.S. 164, 175 (1972) . . . . . .

32. Williams v. Williams, 328 F.Supp. 138 (V.I.D. St. Crois 1971). . . . . .

33. Wong Wing v. U.S., 163 U.S. 228, 238

34. Yassini v. Crosland, 613 F.2d 219 (9th Cir. 1980). . . . . .

AUTHORITIES

1. Antieau, Modern Constitutional Law, 915.39 at 708 (1969) . . . . . .

2. Attorney General of Texas Opinion No. H-586 (April 1975) . . . . . .

STATUTES AND REGULATIONS

1. 8 U.S.C. §§ 1105a, 1158, 1182(c), 125 1252, 1253(h) and 1254 . . . . . .

2. 8 C.F.R. §§ 3.6, 208, 242.5(3), 242.8 242.17(a) and (c), 242.20, 243.1 and

3. Section 21.031, Texas Education Code Tit. 2 (Vernon 1980) . . . . . .

NO. _____

IN THE
SUPREME COURT OF THE UNI
OCTOBER TERM, 19

IN RE: ALIEN CHIL
EDUCATION LITIGAT

STATE OF TEXAS A
TEXAS EDUCATION AG

V.

UNITED STATES

Inter

AND

CERTAIN NAMED AND U
UNDOCUMENTED ALIEN C

On Appeal From The United S
Appeals For the Fifth

MOTION TO AFFIR

Appellees, pursuant to Rule
Supreme Court of the United States,
of the order of the United States Di
Southern District of Texas entered J
Children Education Litigation, 501 F
1980), and summarily affirmed by the
Appeals for the Fifth Circuit, No. 8
1981. The District Court invalidate
Education Code, which precludes the
rollment of immigrant children not "
the United States, as being violativ
Amendment's equal protection and due
This motion is made on the grounds t
opinion and order conform to prior d

and the questions presented in Ap
Statement ("Jur. St.") are so uns
rant plenary consideration by thi

I.

OPINIONS DELIVERED I

The opinion of the Distric
F.Supp. 544 (S.D. Tex. 1980). Th
Fifth Circuit summarily affirmed
ary 23, 1981. Case No. 80-1807.
from the District Court which was
Appellants, a stay was granted by
Appeal, which stay was vacated by
tember 4, 1980. ___U.S.___ (1980

II

QUESTIONS

In addition to the Questic
the Jurisdictional Statement, the

(a) Whether Section 21.031 Tex
cludes undocumented childr
of Texas from attending th
the due process clause of

(b) Whether Appellants' establ
sufficient to withstand e
equal protection challenge
Education Code.

III

STATEMENT

At issue in this suit is
the use of Texas state funds to

1/ Appellants' arguments i
have consistently relied upon an
120,000 class members. In fact,
enrolled in the public schools a
on the streets were the District
this Court has already noted pro
tical case of Doe v. Plyler, No.
35 students in one school distri
were affirmance granted in this

citizens of the United States

Texas Education Code Ann.Tit.

As applied that statute also p

to exclude undocumented childr

2/ Appellees herein w
court. They are school-age
ents. Some parents are U.S.
lawful immigration status, a
sion of immigration document
State of Texas. The challen
cludes from the public schoo
admitted" into the United St
to those children not "legal
aliens", Jur. Stm. 5, "undoc
"whose presence ... is illeg
drafters of Section 21.031 n
plementation have ever deter
categories of non-citizens a
public schools. Few, if any
in the seventeen consolidate
to be deportable from the Un
and policies. The District
trial stipulation agreed tha
are here to stay." 501 F.Su

The Immigration & Na
comprehensive body of legisl
federal control over the adm
within the United States. T
pellants to define appellees
mentioned in the Immigration
of a persons presence in the
against the deportation stat
§ 1251. Until a person form
process hearing and concede
to be deportable by an Immig
right to continue residing
§§ 1105a and 1252; 8 C.F.R.
v. Barber, 345 U.S. 229 (195
U.S. 48 (1955). None of the
parents have been determine
States.

While Section 21.03
non-U.S. citizen children n
United States, decisions of
tions and INS Operations In
provide numerous opportunit
equities to remain in the U
of the federal government a
admitted." See, e.g. 8 U.S
1253(h), 1254, 1259; 8 C.F.
17(a) and (c), 243.4; Savor
At trial, Mr. Edward Randal
cial responsible for enforc
tioned about the many categ
INS regulations and whether
be deemed excludable from t
21.031. Finally recognizin
involved more than calling
ceded that he could only pr
Reporter's Transcript, Volu
e.g. "Tr. Vol. VIII, 332").

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le
n-
t
ot

(501 F.Supp. at 549.) Whi
that Section 21.031 exclud
public schools, they never
supra, and no legislative
the parties or the Distric
Supp. at 555, n. 19. As re
in Federati for American
Civil Action No. 79-3269 (

> The very concept
> only to a vague n
> be deported if hi
> known to the auth
> mination of that
> plicated process
> Nationality Act i
> of provisos and e

Id. at 16, fn. 12.

The uncontradicte
that only about ten perce
this country remain here
at 558. According to evi
and appellees only about
in the United States are
And, of this small group
sometimes accompanied by
come across the border wh
immigration documents."
lants based all of their
Court on the harm that wo
by the enrollment of an e
dren", Id. at 575-578, a

3/ Defendants/appe
(estimates 2.7%); Def. Ex
estimate of 1.6%); plaint
#436 (estimates 3.4%).

surd", discovery on pen
and public statements o
number has barely reach

The District Co
ly assume: "children w
great harm." 501 F.Sup
trial unanimously agree
from an education syste
streets", Ibid., suffe
According to the expert
"behavioral difficultie
sion", "breaks with rea
. . ." Id. at 561-562.
and the District Court
largely "here to stay",
eventually "become perm
vices." Id. at 561.
innocent children with
social and educational
the children's parents,
public education" throu
583, and the State enj
Id. at 580. In fact,
order to increase its
after receiving these
ments of the counted c
funding method leaves
Ibid.

Appellants ass
justify the challenged
sources from the failu
fill its constitutiona
regards control of our
move inducements for i

Statement at 8. Both of these alleged justifications were carefully examined and rejected by the District Court.

With regards the fiscal (resource) argument, even after exaggerating the estimated number of undocumented children twelve-fold, appellants still conceded in final argument at trial: "[T]he State never said it didn't have the money in its budget" to educate the plaintiff class -- "it can come up with the money." Id. at 579. In fact, the children who make up the plaintiff class could be educated using less than .08% of the state's existing annual surplus. Further, the independent school districts in Texas receive more Title I federal education money "than any other state in the nation." Id. at 586. They also receive the lion's share of federal bilingual money. Ibid. And, they do this by counting undocumented children "who are [then] excluded from [the] school[s]."

Every expert who testified, every government and private study examined, and the District Court unanimously agree that contrary to appellants' second asserted justification for Section 21.031, the availability of a public education does not act as an inducement to illegal migration into the United States. Tr. Vol. I, 104-09 (testimony of Dr. G. Cardenas); Vol. V, 655 (testimony of Immigration Judge J. Smith); Vol. III, 424, 427-28 (testimony of Dr. J. Bustamante); Vol. XIII, 136 (testimony of Dr. E. Flores). Numerous studies submitted into evidence by both appellants and appellees corroborate these findings.[4/]

[4/] See, e.g., D.Ex. 14-18 (North & Houston, The Characteristics and Role of Illegal Aliens in the U.S. Labor Market, at 145-49 (only 2.7% of undocumented people interviewed had children in U.S. Schools); D.Ex. 14-19, U.S. Comptroller General Report to the Senate Committee on Budget, at 174 (only 1.6% of undocumented immigrants interviewed had non-U.S. citizen children attending U.S. public schools); P.Ex. 436, Bustamante, The Immigrant Worker: A Social Problem or a Human Resource, at 174 (only 3.4% of Mexican undocumented immigrants have ever had children enrolled in U.S. public schools).

While the District Court focuses its opinion on a Fourteenth Amendment equal protection analysis, it also appeared to believe that the same result would be reached under a due process analysis. 501 F.Supp. at 572-73. Appellants have conceded throughout this litigation that undocumented children are entitled to the due process protection of the Fourteenth Amendment. Applying a heightened judicial standard because the challenged statute targets "innocent children", Ibid., and because it "absolutely" deprives "children" of an education, Id. at 572, the District Court found that the statute should be "scrutinized with care . . ." Ibid. However, the District Court concluded that "the State has not shown that excluding children from school is in any way necessary to the improvement of the education in the State." Id. at 582 (emphasis added). 5/ The District Court's opinion is thus consistent with the Court of Appeals decision in Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980), that the challenged statute is not even supported by a rational basis.

Since the issuance of the statewide injunction in this case approximately 10,000 class members have enrolled in the Texas public schools. Reversal of the lower court's order will put these children back out on the streets. Texas education officials in the past month have testified in the Texas Senate Education Subcommittee in support of a bill to repeal Section 21.031; contrary to appellants' projections, neither fiscal nor space problems of any significance have occu Affirmance of the lower court's order is appropriate without necessarily affirming the reasoning by which it was reached. Mandel v. Bradley, 432 U.S. 173, 176 (1977); Certain Named

---

5/ This Court gives great weight to the trier of facts. Roemer v. Maryland Public Works Board, 426 U.S. 739, 758 (1976) ("it is not our place to appraise the evidence of lower courts unless it plainly fails to support the finding of the trier of fact . . .")

and Unnamed Children and Their Parents, Applicants v. State of Texas, et al., ___U.S.___, 101 S.Ct. 12, 15 (1980) (Mr. Justice Powell) ("it may be possible to accept the District Court's decision without fully embracing the full sweep of its analysis").

While this Court has already accepted jurisdiction over the appeal taken from Doe v. Plyler, supra, affirmance of the herein case would in all likelihood moot the Plyler case (all of whose plaintiffs are also covered by the injunction issued in this case.)

IV.

ARGUMENT

A. Undocumented Immigrants Are Entitled To The Due Process And Equal Protection Clauses Of The Fourteenth Amendment

From the beginning of this litigation Appellants have agreed that "the Due Process Clause of the Fourteenth Amendment applies to undocumented aliens." Joint Pre-trial Order, Uncontested Issues of Law at 15. The District Court relied upon a number of due process cases in reaching its conclusion that Section 21.031 is unconstitutional. 501 F.Supp. at 572-73. The challenged statute "penalizes children because of acts committed by their parents." Ibid. Imposing the disabilities of illiteracy, psychological damage, and social isolation on the plaintiff children because of the administrative law violations of the parents "is illogical and unjust. Weber v. Atena Casualty and Surety Company, 406 U.S. 164, 175 (1972). Undocumented children, like other young children, seldom have the power to choose their place of residence. For example, the District Court heard testimony from a nine year old girl who entered the United States when she was five months old and who, for the past two years, was excluded from the Texas public schools after moving to the State of Texas from Missouri where she had attended the public schools. Ibid. This young girl's father is a United States citizen and her

mother a lawful permanent resident of the United States. The young girl is documentable, but the family cannot proceed with regularizing her status until they receive her Mexican birth certificate which they have been unable to d to date. Ibid.

Cases involving classifications which punish children for acts committed by their parents are not subject to strict judicial scrutiny. They are nevertheless invali if they are not substantially related to a permissible state interest. Lalli v. Lalli, 439 U.S. 259, 264 (1979) The lower court in this case found that "the evidence received in this proceeding" supported a due process analysi leading to the conclusion that the plaintiff children "deserve no additional burdens or penalties." Ibid. Given Appellants consistent concession that the appellee class entitled to the protection of the Due Process Clause of t Fourteenth Amendment, and appellants' failure to address issue in their Jurisdictional Statement, the District Cou Order should be summarily affirmed on due process grounds As stated by Justice Powell in his September 4, 1980 opin vacating the stay issued by the Court of Appeal, "it may possible to accept the District Court decision without fu embracing the full sweep of its analysis." 101 S.Ct. at accord, Mandel v. Bradley, supra, 432 U.S. at 176.

The thrust of Appellants' Jurisdictional Statemer is that undocumented persons residing in the United Stat are not entitled to the benefits of the equal protection clause of the Fourteenth Amendment. Jur. St. at 5-8. W concluding that "states may treat citizens and resident aliens differently than undocumented aliens," 501 F.Supp 565, the District Court nevertheless determined that und mented persons are not totally excluded from the coverag the equal protection clause of the Fourteenth Amendment. at 567. Appellants suggest that "this Court [has] neve

dressed the question." Jur. St. at 7-8. However, bot
Court and various lower courts have held that the equa
tection clause applies to undocumented persons residin
the United States.

This Court has long given the equal protection
tee a broad scope, holding it applicable "to all perso
in the territorial jurisdiction" of the United States.
Wing v. United States, 163 U.S. 228, 238 (1896) (undoc
deportable alien entitled to Fifth and Sixth Amendment
tion).[6/] It is with pain that appellees are forced to
that the appellee-children and appellee-parents, none
have ever been determined to be deportable from the Un
States, are "persons" within the meaning of the Fourte
Amendment.[7/] The only reported cases which appellees
found concerning the non-application of the term "per
involved "unborn children" who are found not to be pr
by the equal protection clause. Green v. Stanton, 45
567, 570 (N.D. Ind. 1978). The appellee-children her
"born", they are residing and growing up in the State
Texas, and they may well be the citizens of the futur

The appellees are also subject to the State's
nal, civil and tax jurisdiction. See, Pre-trial Orde
13, No. 10 (alien tax liability conceded). And, "onc

[6/] See, also, Levy v. Louisiana, 391 U.S. 68,
(illegitimates); Santa Clara County v. Southern Pacif
118 U.S. 394, 396 (1886) (corporations).

[7/] The time is hopefully long past when courts
seriously entertain questions such as whether "a negr
ancestors were imported into this country, and sold a
. . . become[s] entitled . . . [to sue] in a court of
United States." Dred Scott v. Sanford, 19 How 393, 4
L.Ed. 691 (1857). The courts can no longer defferent
withdraw from the arena of "rights", claiming that it
their function "to decide upon the justice or injusti
a classification. Id. at 405. As Professor Chester
states, the "Dred Scott decision was buried by the Fo
Amendment." Antieau, Modern Constitutional Law, § 15
708 (1969).

have become subject to liability under United Stat
they also have the right to benefit from its prote
United States v. Cortes, 588 F.2d 106, 110 (5th Ci
Manifestly, "the obligation of the State to give t
tion of equal laws can be performed only where its
erate, that is, within its own jurisdiction." Mis
rel. Gaines v. Canada, 305 U.S. 337, 350 (1939).

Not long ago, Judge Friendly declared:

> We can readily agree that the due process
> equal protection clauses of the Fourteenth
> Amendment applied to aliens within the Uni
> States . . . and even to aliens whose pres
> here is illegal.

Balanos v. Kiley, 509 F.2d 1023, 1025 (2d Cir. 197
Castillo-Felix v. INS, 601 F.2d 459, 461, 467 (9th
the Court of Appela held that the Fifth Amendment
tection applied to aliens found deportable but see
lief from deportation under federal statutes. In
Chapman, 508 F.2d 1023 (2d Cir.) cert. denied, 423
(1975), the court found that equal protection appl
persons required to appear in deportation hearings
to determine the legality of their presence in the
States. In Frances v. Immigration & Naturalizatio
532 F.2d 268, 272 (2d Cir. 1976), the Court of App
found that the equal protection clause of the Fift
applied to deportable aliens. Again in Holly v. I
F.2d 1294, 1295-96 (2d Cir. 1976), cert. denied, 4
954 (1978), the court found that the equal protect
applies to aliens who entered the United States un
and who are not under final orders of deportation.

8/ See, also, Doe v. Plyler, supra; Martine
Valley Bus Line, 17 F.Supp. 576, 577-78 (N.D. Ill.
documented immigrant entitled in civil action); Ch
of Illinois, 438 F.Supp. 917 (D.C. Ill. 1977) (equ
tion clause extends to aliens residing in the Unit
Nizanuddowlah v. Bengal Cabaret, Inc., 399 N.Y.S.
(1977) (immigrant on temporary visa entitled to eq
tion); Commercial Standard Fire and Marine Company
484 S.W. 2d 636, 637 (Ct. App. Tex. 1972) (undocum
grants have equal protection right to recover on a
compensation claim).

As the State of Texas, through its Attor

has previously conceded:

> [T]he existing case log indicates that t
> rights of illegal aliens are protected b
> U.S.C.A. § 1981 and Fourteenth Amendment
> the United States Constitution. [Citing
> Balanos v. Kiley, supra; Williams v. Wil
> 328 F.Supp. 1380 (V.I.D. St. Croix 1971)
> (undocumented children entitled to atten
> public schools); Martinez v. Fox Valley
> Lines, supra; and Commercial Standard Fi
> and Marine Company v. Galindo, supra.]

Attorney General of Texas, Opinion No. H-586, a
1975). Appellees agree with the Texas Attorney
opinion that even "illegal aliens are protected
the Fourteenth Amendment to the United States C
We also agree that this conclusion is supported
case law . . ." Ibid.

Appellees totally fail to comprehend app
arguments which suggest that both the federal a
ious state governments will become impotent to
sifications based on alienage should this Court
undocumented immigrants fall under the coverage
equal protection clause. Jur. St. 5-8. Appel
tion that application of the equal protection
documented immigrants will result in their eli
a broad array of social services is without me
lower court cases have applied the equal prote
to undocumented or deportable immigrants and,
ing the approrpriate standard of review, have
documented immigrant ineligible for the benefi

9/ See, e.g., Flemming v. Nestor, 363 U.
U.S. V. Gordon-Nikkar, 518 F.2d 97 (5th Cir. 1
Civiletti, 617 F.2d 745 (D.C. Cir. 1979); Cast
INS, 601 F.2d 459 (9th Cir. 1979); Yassini v.
F.2d 219 (9th Cir. 1980).

Contrary to appellants' concerns, the Distri
ly reasoned that "states may treat citizens
aliens differently than undocumented aliens
at 565. In this case and Doe v. Plyler, the
simply found that the State of Texas had fa
even a rational basis for excluding childre
been determined to be deportable aliens, fr
schools.

The cases cited by appellants lend
to their position. Appellants totally misc
tio decidendi of Burrafato v. Department of
554 (2d Cir. 1975), cert. denied 424 U.S. 9
rafato concerns subject matter jurisdiction
ment "procedural due process" questions inv
review of visa issuance decisions made abro
officers of the U.S. State Department. The
in Burrafato had nothing to do with the imm
of the plaintiff in that case. See, Browne
352 U.S. 180, 184 (1956). De Canas v. Bica
(1976), also relied upon by appellants likew
ing on the equal protection clause but rath
whether a state law was preempted by the Im
Nationality Act. Id. at 937. United State
479 F.Supp. 519 (D.Alas. 1979), involved th
of Japanese nationals who were not reside
territory of the United States and thus th
ly within the authority distinguishing the
grants within and without the territory of
Further, the case involved a question of f
over international affairs and the interpr
Fifth Amendment in that particular context

Given that appellants' Jurisdictio

clusively relied upon the contention that
dren cannot seek judicial review under the
laws of the Fourteenth Amendment, we respe
appellants present no substantial question
by the Court, and that the order of the Di
be summarily affirmed.

B. Appellants Have Not Articulate
Justification To Support The
Statute

Appellants argue, without analysi
has articulated [a] sufficient basis to s
Jur. St. at 9, citing Dandridge v. Willia
(1970). This conclusory assertion, offer
tual support, should not justify plenary-
Assuming that equal protection and due pr
applicable, only the District Court thus
searching examination of the alleged just
statute; and the trial court provided ext
grounded reasons for concluding that Texa
its total exclusion of the appellee-child
the public schools.

The State of Texas offers only t
for its policy of excluding innocent chi
lic schools: "to protect its resources,
incentives for illegal immigration . . .
With regards the first assertion, the lo
instant action and in Doe v. Plyler, hav
21.031 bears neither a substantial nor a
ship to the preservation of the State's
resource arguments were entirely based o
approximately one-hundred-twenty thousan
age children resided in the State of Tex

the public schools but for Section 2
575-79. The trial court, after hear
nesses found this estimate to be "ab
able" and "grossly over-estimated .
ing the past school year, only ten t
umented children have enrolled in th
as a result of the injunction issued
noted throughout the District Court'
Texas conducted absolutely no studie
umented children on its public schoo
in 1975 to prohibit their enrollment
numerous affidavits attached to appe
Vacate Stay submitted to this Court
of the poorer school districts in Te
state funds based on the number of s
financially better off enrolling the
noted by the District Court in Doe v
requires school districts "to exclud
from [their] ADA [average daily atte
amount of state funds [they] receive
And, the State often stated during t
that it "has the duty to protect the
the local independent school distric

The State's "resource" argum
more questionable given that Texas "
with a surplus of approximately $2.1
fiscal policies which prohibit defic
It should also be understood that th
undocumented children in order to ob
funds. This leads to a windfall for
admitted into the Texas public schoo
recognized that the parents of exclu

significantly to the funding of ed

the payment of taxes. On July 23,

troller stated:

> illegal aliens have been p
> vehicle tax and gasoline t
> sidents. Some may treat t
> citizens but they are firs
> Frankly, its time we quit
> some kid was born and star
> kind of education all our

Appellees' Application to Vacate S

phasis added). In fact, appellant

trial Order that "undocumented ali

the State of Texas are not exempt

requirements." ("Uncontested Issu

counsel for the State noted in clo

> There is no place in this
> the State has said the St
> have enough money. Not o
> come up with the money.
> legislature to fund certa
> go down and get them to f
> never said it didn't have

501 F.Supp. at 579.

Appellants should not now

Section 21.031 is justified by a

tives for illegal immigration . .

fact, "[n]either the court nor th

a shread of legislative history a

ment" enacting Section 21.031. 5

Quite contrary to their current c

pulated as an uncontested issue o

Order that "the availability of e

the major pull-factor in attracti

into the United States." Joint P

9. As noted above at page 8, bot

tary evidence submitted by both p

established that the availabilit

for minor children plays no me
migration of undocumented immi
Appellants' conclusory assertio
in its Jurisdictional Statemen
review by this Court.

CONCL

For the reasons stated
submit that appellants present
the decision of this Court, an
court should be affirmed. Thi
proximately ten thousand child
public schools of Texas and wo
pending case of Doe v. Plyler.

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DATED: May 29, 1981

CERTIFICA

I, PETER A. SCHEY, c

by certify that a true and c

Motion to Affirm has been se

ing same in the United State

to:

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

IN RE: ALIEN CHILDREN
EDUCATION LITIGATION

STATE OF TEXAS AND
TEXAS EDUCATION AGENCY

Appellants

V.

UNITED STATES

Intervenor-Appellee

AND

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN

Appellees

On Appeal From The United States Court Of
Appeals For The Fifth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

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Attorneys for Appellees

* Counsel of Record

///

///

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NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

IN RE: ALIEN CHILDREN
EDUCATION LITIGATION

STATE OF TEXAS AND
TEXAS EDUCATION AGENCY

Appellants

V.

UNITED STATES

Intervenor-Appellee

AND

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN

Appellees

On Appeal From The United States Court Of
Appeals For The Fifth Circuit

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The United States District Court for the Southern District of Texas entered its order on July 21, 1980, certifying this suit as a Texas-wide class action, declaring unconstitutional Section 21.031, Texas Education Code, and granting certain class relief. The opinion and order of the District Court are officially reported at 501 F.Supp. 544 (S.D. Tex. 1980).

The matter was appealed to the United States Court of Appeal for the Fifth Circuit, No. 80-1807, which Honorable Court summarily affirmed the district court on Februa 23, 1981. Defendants/appellants filed a notice of appeal in the Court of Appeals on March 2, 1981. Appellants file their Jurisdictional Statement on May 8, 1981.

Appellees Sandra Cardenas and Maria Cardenas, and those class members granted relief by the District Court, ask leave to file the attached Motion to Affirm and to proceed in this Court in forma pauperis, without prepayment of fees and costs or security therefor, pursuant to Supreme Court Rule 46. The affidavits of appellees Sandra Cardenas and Maria Cardenas in support of this motion are attached heretó.

Respectfully submitted,

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DATED: MAY 29, 1981

By: Peter A. Schey
PETER A. SCHEY
Counsel for Appellees

CERTIFICATE OF SERVICE

I, PETER A. SCHEY, counsel for appellees, do h
by certify that a true and correct copy of the foregoi
Motion to Proceed In Forma Pauperis has been served up
all parties by placing same in the United States Mail,
class, addressed to:

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On this 29th day of May, 1981.

PETER A. SCHEY
Attorney for Appell

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

IN RE: ALIEN CHILDREN
EDUCATION LITIGATION

STATE OF TEXAS AND
TEXAS EDUCATION AGENCY
Appella

VS.

UNITED STATES
Interve

AND

CERTAIN NAMED AND UNNAMED
UNDOCUMENTED ALIEN CHILDREN
Appelle

AFFIDAVIT

I SANDRA CARDENAS, being first duly sworn according depose and say, in support of the Motion For Leave In Forma Pauperis, the following:

1. I am one of the named-plaintiffs in mentioned cause of action.
2. Because of my poverty I am unable t of this litigation.
3. I am unable to give security for th
4. Because of my poverty I have not pa in this litigation and I have been by legal aid lawyers.
5. I respectfully request that I and m be allowed to proceed in forma paup

Sandra Ca
Sandra Cardena

STATE OF TEXAS I

COUNTY OF HARRIS I

Before me, a notary public, on this
appeared SANDRA CARDENAS, known to me to be the p
is subscribed to the foregoing instrument and, b
duly sworn, declared that the statements therein
true and correct.

Given under my hand and seal of off
day of May 1981.

Marie A. V
Notary Public in
Harris County T E

My commission expires:

July 14, 1985

MARIE A. VILLARRE
Notary Public in Harris Coun
My Commission Expires July

NO. _____

IN THE
SUPREME COURT OF THE UNITED
OCTOBER TERM, 1980

IN RE: ALIEN CHILDR
EDUCATION LITIGATIO

STATE OF TEXAS AND
TEXAS EDUCATION AGENC

VS.

UNITED STATES

AND

CERTAIN NAMED AND UNNAME
UNDOCUMENTED ALIEN CHILDR

AFFIDAVIT

I, MARIA CARDENAS, being first duly sworn
depose and say, in support of the Motion Fo
In Forma Pauperis, the following:

1. I am one of the named-plaint
mentioned cause of action.

2. Because of my poverty I am
of this litigation.

3. I am unable to give securit

4. Because of my poverty I hav
in this litigation and I ha
by legal aid lawyers.

5. I respectfully request that
be allowed to proceed in fo

Ma
Mari

STATE OF TEXAS I

COUNTY OF HARRIS I

Before me, a notary public
appeared MARIA CARDENAS, known to me to
is subscribed to the foregoing instrume
duly sworn, declared that the statement
true and correct.

Given under my hand and se
day of May 1981.

Marie
Notary P
Harris C

My commission expires:

July 14, 1985

Notary Pu
My Com

No

In the Supreme C

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IN RE: ALIEN CHI
STATE OF TE

UNITED STATES
UNNAMED UNDOC

ON APPEAL FROM THE
FOR TH

MEMORANDUM

1. Whether an un
of Texas is a "pers
covered by the Equ
teenth Amendment.

2. Whether, if un
the Equal Protecti
operates to deny unc
in Texas the tuition
all other children re
teenth Amendment.

TA

Case:
Doe v. *Plyl*
2d 448,
(May 4, 1
Constitution and
United St
Amendme
Tex. Educ.
1980)....

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1934

IN RE: ALIEN CHILDREN EDUCATION LITIGATION

STATE OF TEXAS, ET AL., APPELLANTS

v.

UNITED STATES AND CERTAIN NAMED AND UNNAMED UNDOCUMENTED ALIEN CHILDREN

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

---

1. Before 1975, Texas law required every local school district to offer tuition-free education to all children of school age residing in the district (J.S. App. 26). In May, 1975, the Texas legislature enacted Tex. Educ. Code Ann. tit. 2, § 21.031 (Vernon 1980), which permits local districts to deny enrollment to undocumented alien children and denies local school districts any state funds for the education of undocumented alien children (J.S. App. 26).

During 1978 and 1979, suits challenging the constitutionality of Section 21.031 and various local practices undertaken on the authority of that statutory provision were filed in each judicial district in Texas (J.S. App. 20-21). Each suit named as defendants the

State of Texas and the Texas Education Agency, as well as local school officials. One such action, *Doe* v. *Plyler*, 458 F. Supp. 569 (E.D. Tex. 1978), aff'd, 628 F. 2d 448 (5th Cir. 1980), prob, juris. noted, No. 80–1538 (May 4, 1981), involved a challenge to Section 21.031 and its enforcement by the Tyler, Texas, school district. In *Doe*, the district court held in 1978 that Section 21.031 violates the Equal Protection Clause and is pre-empted by federal law. On the Equal Protection issue, the district court in *Doe* held that Section 21.031 does not rationally advance any of the interests the State offered to support its decision to exclude the children from public school (458 F. Supp. at 585–590). The State and the local school district appealed the decision.

2. In September 1979, the State filed a motion with the Judicial Panel on Multidistrict Litigation (J.S. App. 21) to consolidate into one action all the other related cases that were pending in district courts in Texas but were not yet decided. On November 16, 1979, the panel consolidated all claims against the State and the Texas Education Agency into one action to be heard in the Southern District of Texas; the claims against local officials were retained in the districts in which the cases had been filed. On February 1, 1980, the district court for the Southern District of Texas granted the United States' motion to intervene as plaintiff in the consolidated action.

The hearing in this case was held between February 19 and March 28, 1980.[1] On July 21, 1980, the district court entered an opinion and order holding that the portions of Tex. Educ. Code § 21.031 that denied undocumented alien children a state-supported education violated the Equal Protection Clause

[1] The record in this case is voluminous, consisting of twenty-five volumes of transcript and more than one hundred exhibits

of the Fourteenth Amendment (J.S. App. 17–68
The court found that the classification the State us
was "wholly irrelevant to the achievement" of sta
objectives (J.S. App. 67).

The court also stated that for several reasons t
statute should be subjected to careful scrutiny. T
court stated that in depriving children of an educ
tion the State is denying the children a fundament
right (J.S. App. 29–41). The court also held that b
cause some districts would enroll undocumented ali
children if they paid tuition—which they are near
all unable to afford—the classification deprives the
children of an education because of their indigenc
(J.S. App. 48–52) and that the statute improperl
penalizes children based not on their own actio
but based on parental action of which the State di
approves (J.S. App. 52–53).[2] The court enjoined t
State Commissioner of Education and his "emplo
ees, agents, successors, assigns and all those in co
cert with him" from denying any child a publ
education based on the child's immigration statu
(J.S. 17–18). The State of Texas appealed.

3. While the appeal in this case was pending,[3] t
court of appeals rendered its decision on the appeal
Doe v. *Plyler*. The court of appeals held in *Doe* th
federal law does not pre-empt Section 21.031, but
agreed with the district court that Section 21.031 vi
lates the Equal Protection Clause and affirmed t
order holding the statute unconstitutional. 628 F.
448. After the court of appeals entered its decision
Doe, the United States, joined by the private plai

[2] The court also held that the statute was not pre-empt
by federal law or treaties (J.S. App. 68–89).

[3] The court of appeals stayed the order pending appeal. S
order in No. 80-1807 (August 12, 1980). Justice Powell vacat
the stay on September 4, 1980. No. A-179; J.S. App. 1–8.

tiffs, moved for summary affirmance of the
court decision in this case. The court of
granted the motion for summary affirmance o
ruary 23, 1981 (J.S. App. 9).

4. This Court recently noted probable juris
to review the *Doe* decision, which involves the
of the same statute and of its application in on
district. The present case is state-wide litigati
therefore has a more extensive record regardi
operation of the statute. Accordingly, we have
jection to appellants' suggestion (see J.S. 4) t
Court note probable jurisdiction and consolid
action with *Plyler* v. *Doe*.

Respectfully submitted.

WADE H. MCCREE, Jr
Solicitor General
JAMES P. TURNER
Acting Assistant
Attorney Ge

JUNE 1981

GPO : 1981 0 -

NO. 80-1934

IN THE

Supreme Court of the United

OCTOBER TERM, 1981

TEXAS, ET AL.,

v.

CERTAIN NAMED AND UNNAM
UNDOCUMENTED ALIEN CHILDREN

ON APPEAL FROM THE UNITED STATES COU
APPEAL FOR THE FIFTH CIRCUIT

APPELLEES' BRIEF ON THE MEI

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QUESTIONS PRESENTED FOR

1. Whether the alienage provisions of Texas Education Code Ann. tit. 2 (Vern after "Section 21.031", by causing the t certain non-United States citizen children f free public schools, violates the equal pro the Fourteenth Amendment?

2. Whether the total exclusion from a caused by Section 21.031 unjustifiably infr interest thereby violating the due proce Fourteenth Amendment?

3. Whether the alienage provisions of Se pre-empted by federal immigration policy between the State and Federal policies?

4. Whether the alienage provisions of frustrate and conflict with Federal Educa

5. Whether implementation of the alien Section 21.031 violates the procedural pro by the due process clause of the Fourteer

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lationship Betwee
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(3) SECTION 21.031 VIO
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(4) SECTION 21.031 IS PR
CONFLICTS WITH AI
FEDERAL IMMIGRA

(5) SECTION 21.031 IS PR
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IN THE

Supreme Court of the United S

OCTOBER TERM, 1981

NO. 80-1934

TEXAS, ET AL.,

v.

CERTAIN NAMED AND UNNAMEI
UNDOCUMENTED ALIEN CHILDREN, E

ON APPEAL FROM THE UNITED STATES COURT
APPEAL FOR THE FIFTH CIRCUIT

APPELLEES' BRIEF ON THE MERI

I

STATEMENT OF THE CASE

Without ever determining the impact that undc
immigrant children[1] were having on the Texas e
system, defendants enacted and implemented a
1975 restricting public school attendance to ci

---

[1]Throughout this litigation and in their Brief for the Appel
Bf."], Appellants/Defendants ["defendants"] refer to
excluded from the Texas public schools as "illegal aliens

(footnote continued from preceding page)

App. Bf. 8-19. Disposition of this case requires a critica
of the total imprecision with which defendants engrafte
gration and deportation laws into their exclusionary st
"illegal alien" bears no rational relationship with th
immigrants created by the Immigration & Nationality A
U.S.C. § § 1101, *et seq.*, and regulations promulgate
C.F.R. § § 1.1, *et seq.* Nowhere in the INA is the term
mentioned. Instead, the legal ability to retain residenc
States is measured against the deportation statutes
promulgated thereunder. *See, e.g.*, 8 U.S.C. § § 1251-
§ § 241-245, 248-249. Importantly, the question of de
beyond the "legality" of a persons entry into the Unit
until an Immigration Judge reaches a determination t
deportable, the person involved retains the *right* to cont
the United States. *See, e.g.*, 8 U.S.C. § § 1105a, 1242;
Heikkila v. Barber, 345 U.S. 229 (1953); *Shaughnes*
349 U.S. 48 (1955). Immigrants who have entered unlaw
a defense to explusion which can be asserted in deportati
See, e.g., 8 U.S.C. § § 1182(c), 1182(h), 1182(i), 12
1254 and 1259; MITGANG, ALTERNATIVES TO DEPORT
PROVISIONS OF THE I.N.A., 8 U. of Cal. Davis L.Rev. 3
federal district court in *Federation for Am. Immigra*
Klutznick, 486 F.Supp. 564 (D.D.C.), appeal dismisse
(1980), *aff'd mem.*, No. 80-1246 (D.C.Cir. Nov. 6, 19
No. 80-975 (Mar. 23, 1981), recognized that:

> The very concept of "illegal alien" amounts only to a
> of a person who might be deported if his or her p
> known to the authorities. But the determination of t
> can be a complicated process, as numerous cas
> attempts by the INS to beport residents of this cou
> strate. The Immigration & Nationality Act is long
> full of provisos and exceptions.

Id at 573 n.12. Chief Judge Kaufman of the Federal Cou
the Second Circuit has noted the "striking resemblance"
Mino's labyrinth in ancient Crete. . . and the Im
Nationality Act." *Lok v. INS*, 548 F.2d. 37, 38 (2nd C
face of a set of federal immigration laws easily as con
laws, defendants have been at a loss to adopt a coherent
their own statute. The Assistant Commissioner for Edu
responsibile for monitoring and implementing the ch
was questioned at trial about different categories of

"lawfully admitted" immigrants.[2] No wr
history exists concerning the enactment of
Id. at 555 n. 19; R. I at 183, ¶ 10. The Stat
challenged statute primarily serves the "[p]r
state's resources for the education of its law
App.Bf. at 13 and 25. The State's "educati
are primarily evaluated in terms of "educ
tures. . ." *Id.* at 28. However, defendants c
argument that "the state [never] has said th
doesn't have enough money" to educate th
R. XXIV, at 78-79; 501 F.Supp. at 579. A

(footnote continued from preceding page)

entered the United States without inspection, wit
rights under Section 21.031. When faced with the
questions, this witness could only provide his
According to this witness, a child could be exclud
schools because s/he is "an illegal alien." Record o
at 303 [hereinafter, e.g. R. XIII at 303.]. A child
INS documentation but whose presence is known to
be "ineligible" to attend the public schools. *Id.* 34

"A child can be excluded even if her "father is a U
and the child's mother is a documented resident ali
Children Education Litigation, 501 F.Supp. 54
1980). Given this state of affairs, plaintiffs/ap
"plaintiffs"] will use the terms "undocumented
documented children" and "plaintiff-children"
throughout this brief. Our use of these terms *is not*
these children are unlawfully present in the countr
merely use these terms to define the children exclude
schools.

[2]"[P]rior to the passage of the amendment to Sect
the State never had attempted to determine the numb
children attending Texas Public Schools, nor the i
these children upon the [independent] school distri
trial defendants' "impact" arguments assumed
120,000 "illegal alien" children would enroll in the
Section 21.031 to be held unconstitutional. After e

come up with the money." Id. (empha
court concluded that "[t]he evidence
that the State or the [independant] sc
necessary funds" to educate the pla
579.[3] Defendants also argue in this C
principle justification for Section 21

(footnote continued from preceding page)

of pages of exhibits and hearing from five ex
court concluded that this estimate was "bizza
576. Plaintiffs' experts at trial estimated t
undocumented children resided in Texas. *Id*
35.5 plaintiffs are submitting a separate mo
Court that only approximately 12,000 plain
following the issuance of the permanent injun
deposition taken in the district court indicate
no studies to determine the impact of the admi
An independent study funded by the Ford Fo
Corporation and conducted by the Intercultu
Association, relying exclusively upon data
points out that only 47 out of 1,080 indepe
bothered to update statistics on the enr
children, only 37 school districts reported c
50 undocumented children enrolling, and t
enrollments in the handful of districts *most* in
the general declining enrollments in those dis
undocumented students cushioned . . . the
declines . . . [and] enabled some school syste
would have been lost" due to declining enr
DISTRIBUTION OF UNDOCUMENTED PU
SCHOOLS; A FIRST LOOK, 12 (1981).

Given the importance of the facts whi
subsequent to the trial of this case, these Co
remand for further evidentiary findings. 7
Chrysler Motors Corp., ____ U.S. ____ ,
(May 18, 1981); *Coopers and Lybrand v. Li*
473 (1978).

[3]The State budget "showed a closing bala
$2.15 billion for funds that can be appropria
educational purposes. 501 F.Supp. at 580.

inducement for illegal entry." App.
show the total irrationality of thi
defendants stated in their post-tri
Fact: *"Undocumented aliens do*
States in search for a free educ
(emphasis in original).

Three separate district courts ha
review tens of thousands of pag
testimony in search of a ration
exclusion of the plaintiff-children
and the preservation of or incre
portunities available to children
public schools.[4] None of the Co
21.031 justified by even a rationa

It is critically important for t
precisely who is being excluded fr
Texas. Defendants simplistically
citizens in this country can be div
"Legal aliens" and "illegal aliens

---

[4]The third case, not before this Court
School District v. Certain Named and U
Children, No. B-80-234 (S.D.Tex.,
Memorandum filed January 20, 1980,
district court concluded that the Bro
District had failed to establish that the
children would measurably decrease the e
other children. The district court in *In*
Litigation concluded that "[t]he classific
to the achievement of the State's obje
(emphasis added). The District Court in
(N.D.Tx. 1978), found that there was no
Section 21.031 and preserving or impr
available to non-excluded children, and
with this finding of fact. *Doe v. Plyler,* 6

[5]*See* Footnote #1, *supra.*

simple. Defendants agreed with
that "*as a practical matter [*
likely to remain residents of th
future..." Pre-Trial order at 12
district court agreed with plain
plaintiff-children, "for good or
F.Supp. at 558 (emphasis add

**(a) Migration of the Plaint
Parents into Texas.**

Defendants first discuss t
creasing "illegal immigration
"specifically" Texas, harping
government to control immigra
of Texas." App.Bf. at 5-6. Pla
Government[6] agree that the pr
serious one, but plaintiffs b
nificantly mischaracterized bo
and its impact on the State.

Unlawful immigration is ne
problem. It is of a global na
experienced by the United St

---

[6]The United States Government
"has developed and presented to the
to address the problem of illegal i
proposal is the creation of a new lega
in the United States in violation of th
1, 1980. . . If Congress adopts the
thereby sanction the long-term prese
qualify for and attain the status." Br
curiae in No. 80-1538 and Brief for
[hereinafter "U.S.Bf."] at 20-21.

years.[7] The search for emp
undocumented workers, pa
historically been encoura
governments. *See gener*
Cornelius, perhaps the for
migration into the United S
extensive labor recruiting,
laws, the investments and
Mexico, the activities of a
entities on our side of the
The United States has d
Mexican migrants into t
(emphasis added). Joint
P.Int. Ex. 47, at 40 and 6

One government-sponso
forcement of immigration l
economic concerns of ag
businesses from the time
immigration laws were susp
to enter the United States."
that "for generations the
unskilled labor on the Soutl
a long history of deman

---

[7]Plaintiff-Intervenor Exhibit
Council Committee on Illegal
(1976); R. V, at 56; R. VIII, a

[8]The treatment of Mexican
notorious in its abuse of these w
from utilizing Mexican laborers
at 62-63. A recent government
changed much: "*[T]he situation*
person . . . resembles the early s
supra, at 25 (emphasis added).

Defendant's Exhibit
(emphasis added).

As all the parties a
prohibiting the empl
Interestingly enough,
gation which in 1952
included in the Immig
§1324, *exempting*
workers from the crin
172.[9] And, while at l
wide "employer sanct
consistently killed AF
to make the hiring of
state law. D.Ex. 4-12
579 n.88. As State Re
opposition to such le
"represent rural dist
documented workers i
at 150.

(b) Profile of the Temporary Ve

The basic profile o
young, single, adult

[9]"Thus the Southwest
with respect to its use of
federal policy, led to the
Proviso in the Immigra
defines employment of o
as non-harboring activit
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at 13 (emphasis added).

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**(c) Children c
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[10]501 F.Supp. at 5
(testimony of form
Castillo); P.Int.Ex. 4
59-60; P.Ex. 209 at

[11]P.Ex. 429, at 108
12 at 41; P.Ex. 209
430-31; R. X at 38.

[12]*See, e.g.*, 501 F.
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14-19, U.S. Comptr
the Budget, at 11 (or
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had ever had childre
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[13]R. X at 44

[14]The Immig
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previously attended public schools in New Jersey and Missouri, applied to attend a Texas public school and was rejected. Id. Her eight year old brother, born a few months after the family moved into the United States, attended a Texas public school.[15] The Immigration Counselor assisting this family testified that he could not even file an immigration application for the girl until he obtained a copy of the mother's Mexican birth certificate, and that no documentation could be obtained from the Immigration Service until the child gained lawful permanent resident status.[16] Former INS Commissioner Leonel Castillo confirmed that it often takes years to obtain just the preliminary documents needed to support an application to the INS, and that applications are often backlogged causing up to "*a seven year wait.*" J.A. at C-30 (emphasis added).[17] The district court noted many of the "undocumented children are not deportable." 501 F.Supp. at 583.

(d) Parents of the Plaintiff-Children Pay Their Share of Taxes Which Finance Public Education

Reserve than seeking to "preserve" resources, the exclusionary statute has the intended (or unintended) effect of providing a "windfall" to those children allowed to enroll in the public schools. Numerous government and private

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[15]R. XI, 1-33; 7-29 to 31; P.Exs. 272-273.

[16]R. XI, 7-6 thru 7-12.

[17]When told the facts in of this young girl's case, former Immigration Service Commissioner Castillo stated that there was only a "remote" possibility of her ever being deported from the United States. R. VI at 73-74. In fact, this young girl is probably a United States Citizen. *See,* INA §301(e), 8 U.S.C. §1401 (e).

studies agree that the undocumented immigrant worker pays his/her fair share of taxes, while hardly ever utilizing social services.[18] The parents of the named plaintiff-children all pay taxes. P.Exs. 76-100, 109, 115, 119 and 141. Defendants proposed the following finding of fact to the trial court: "*Undocumented aliens who reside and work in the State of Texas are not exempt from state and federal tax requirements.*" R. I at 184, ¶ 14 (emphasis in original).

Public education in Texas is financed primarily through sales taxes and *ad valorem* property taxes. The parents of excluded children, whether U.S. citizens, documented or undocumented workers, are unable to escape the payment of these taxes; they buy consumer goods and they contribute property tax revenue through the ownership of homes and through the payment of rent. R. V at 80-83; R. VII at 431-32; P.Ex. 207 at 6-7.

The State of Texas goes one step further to gain a "windfall", 501 F.Supp. at 586, by refusing to enroll the plaintiff-children. Texas participates in the federal Title I Migrant Project, 20 U.S.C. §§2761-2763, a program designed to provide the element of continuity to the education of children of migratory/agricultural workers.[19] Defendants "recruit" undocumented children and complete federal forms which are forwarded to a federal computer terminal (Migrant Student Record Transfer System - "MSRTS") to identify the residence and educational

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[18]J.A. at E-13 (73.2% of those interviewed payed income tax); J.A. at E-61, (81% had income tax deducted); J.A. at E-38 (90% pay income tax); P.Ex. 455, at 26 (96% pay income tax). This Court has recognized that "aliens, like citizens must pay federal taxes. . ." *Mathews v. Diaz*, 426 U.S. 67, 83 n. 22 (1978). *See* footnote 52, *infra*, for studies on use of social services.

[19]3 U.S. Code Cong. and Ad. New 4113 (1974).

progress of every migrant child in the United States. R. XV, at 1007; R. XV at 1093-94; P.Ex. 249 at 25. As the district court noted, "[t]here is no question that Texas enrolls undocumented children into the MSRTS." 501 F.Supp. at 586. In short, Texas receives money for education from the federal government "because of the presence of children who are excluded from school." *Id.*[20]

No economist could accurately assess the degree to which the undocumented population contribute towards the State's healthy economy. However, the Texas Business Review has concluded that "[i]f illegal Mexican migration to the United States were to cease, . . . *higher labor costs could cause some employment opportunities to disappear altogether, if mechanization became economically feasible. The elimination of jobs now filled by aliens could also result in a loss of complimentary jobs for United States citizens.*" P.Ex. 429 at 108 (1978) (emphasis added).

(e) Availability of Funds for Texas' Educational System

Simply put, Texas enjoys a healthy economy. As of August 31, 1979, the surplus reached $2.15 billion, a 3.7% increase over the cash balance available at the beginning of the year. P.Ex. 204 at 7.[21] The various State funds which are the sources for educational revenues, consistently experience cash balances (surpluses) averaging one billion

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[20] "Of an annual national appropriation of almost a billion dollars, over one-fourth of that amount will be allotted to Texas. Undocumented children account for some of this money." *Id.* at n. 116.

[21] In contrast it might be noted that Texas ranks 42nd of the 50 states in current per pupil expenditures. 501 F.Supp. at 580.

dollars.[22] While defendants belatedly suggest that they not have the resources to provide all children residing in State with the type of education which they presently prov to those allowed enrollment, at trial their expert witnes and counsel freely conceded that the funds to provide equal education for *all* children were available. 501 F.Su at 580; R. XXX at 78-79. With a $2.15 billion ann surplus, enrollment of even 20,000 plaintiff-children cou if the State so desired, have no more impact than a 0.7 reduction in the State surplus.[23]

(e) Educational Needs of the Plaintiff-Children

Defendants suggest that "as many as 99% of [t plaintiff-children are Mexican and may be monolingual Spanish." App.Bf. at 8. And, that "illegal aliens generally lower in educational capabilities than legal migrants." *Id.* These assertions are not supported by the t record, and are totally contradicted by the positions adop by defendants at trial.

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[22]The bulk of the State budget is derived from consumer and prop taxes, primarily the State's sales tax. R. XVI at 1112; *See gener* P.Ex. 204 (1979 Annual Financial Report for the State of Te Monies for education are primarily placed in and disbursed from General Revenue Fund, the Omnibus Tax Clearance Fund, Highway Motor Fuel and Tax Funds, and the Permanent Escrow F R. XVI at 1113; XIX at 2236-37; P.Ex. 204 at 14-15; *see also,* P 276-278 and 300. The General Revenue Fund, with surpluses fo last twelve years, currently has a cash balance exceeding $600 mil R. XXV at 118-19. This surplus alone could finance education hundreds of thousands of children. R. XXIX at 14-15; J.A. at D-

[23]The State provides approximately $800.00 per child to the i pedent school districts. R. XIX at 2255, 2265 and 2268.

Defendants have previously conceded that "*[w]h*
not a student needs bilingual education is . . .
function] of their immigration status." R. I at 18
(emphasis in original). Defendants further concec
"*[t]he educability of a child is a function of his or h*
education and cultural background and not a fun
immigration status." *Id.* at 183, ¶ 12 (emphasis a
An abundant amount of expert testimony at trial, of
both defendant's and plaintiff's expert witnesse
robarates what the district court found: "Nothing ab
immigration status distinguishes [the plaintiffs-c
from other children in terms of their education need
F.Supp. at 583. Indeed, many undocumented
"previously have attended schools in other states.
583 n.104.

An excluded child from Dallas testified entirely in

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[24]Defendants now assume that the entire class of plaintiff c
made up of "illegal aliens" who have seemingly all arri
"Mexico" within the past few weeks. App.Bf. at 9. They fail to
that thousands of class members are children provided an ed
Texas before the challenged statute became operative, and m
children, such as Unnamed Witness No. One, have recently
Texas after receiving education in other parts of the Unit
Defendants' Brief on the Merits to this Court contains
inaccuracies when referencing the record on this issue:
fendants argue that the plaintiff-children are "migratory in
App.Bf. at 9. Defendants first reference is to R. XXV at 6, J.A
wherein the witness is describing migrant children *currently* e
her school. This testimony had absolutely nothing to do wi
alien" children. Secondly, defendants cite D.Ex. 4-16 at 664,
J.A. E-90-94. [Note: At the time of this writing plaintiffs
citations in defendants' brief referenced to the original Record
References to the Joint Appendix have been included where
be easily determined.] Once again, a review of these pa
transcript indicates that the witness was *not* testifying abo
alien" children; (2) Defendants state that "illegal aliens" hav
differences from native Mexican-American students wh

in open Court and exhibited no need for bilingua
R. XI at 48-52 An expert witness in bilingua
testified that based on her experiences less thar
the undocumented children in Texas were r
Spanish speakers. R. XIII at 261. She testified t
of them are going to be [speaking] English. . . [
talking about massive help for everyone of thos
J.A. at C-48-49.[25]

(footnote continued from preceding page)

educational difficulties," App.Bf. at 9, citing D.Ex. 4-16
E-85. A review of the transcript indicates that the testim
the necessity for *newly arrived* immigrants, whether d
undocumented, to learn the American way of life; (3) De
that "as many as 99% of these children . . . may be r
Spanish." App.Bf. at 8, citing D.Ex. 4-16 at 190, J.A. at E
This witness, Sally Dysart, a school teacher, more accu
that there is a wide spectrum in the English dominan
Mexican undocumented children. *Id.* at 663-664. E
concerned children who had been in the United States '
time." *Id.* at 664. That is, children who had been here for
. . ." *Id.*; (4) Another witness cited, Cecilia Salinas, testifi
great difficulty in distinguishing Mexican legal immig
documented immigrants. D.Ex. 4-16 at 711-12; (5) De
that "illegal aliens" further "disrupt bilingual programs.
10, citing R. XXVI at 6. This witness was clearly
difficulties of the bilingual program in light of *migrant* ch
witness was referring to students currently enrolled in
clearly not "illegal alien" children precluded from atten
schools at the time of the trial. *Id.* at 8. In fact, this witn
that "it is tremendous to see the amount of language
speaking students] have acquired in . . . one year" of bilin
Id. at 7; (6) Defendants cite the testimony of INS D
Chambers in support of the view that education provide
to illegal migration. App. Bf. at 11-12, citing J.A. at E-7
this witness, an Immigration Service official, clearly st
never come across *any* undocumented immigrant who
come to the United States for educational purposes. D.I

[25]The Flores-Cardenas study of undocumented famili

The state's past effort to address to the
English-speaking students is so dismal tha
they should now argue that the inadequacy
justify keeping children out of school. *See*
135.[26] While some bilingual programs may
at opitimum level, Mr. Robert Tipton, an ex
defendants, conceded that 90% of the ex
were "adequate". J.A. at D-68.

A bilingual education expert, Dr. Gloria Z
that "team teaching" can be adopted in bil
short of fully certified teachers. R. X
Defendants' expert witness admitted that "
team teaching" are already utilized. J.A.
Zamora testified that the quality of the e
programs would not be decreased if mor
models were adopted. J.A. at C-46. Th
witness agreed that "team teaching is goo
work together. . .Methods don't have to be
attitude has to be the same." R. XXII at

(footnote continued from preceding page)

excluded under Section 21.031 indicated that the
been present in the United States for 6.5 years. J
therefore not surprising that the bilingual needs of th
vary widely. Dr. Albert Pena, an expert witness, co
all [undocumented children] would need bilingual ed
50. Ultimately, the necessity for bilingual educatio
"individual child's needs." R. XIII at 205.

[26]In 1918 the Texas Legislature enacted a law
"[e]very teacher, principal superintendent. . . sh
language exclusively. . . Any teacher, principal, su
other school official. . . failing to comply with thi
deemed guilty of a misdemeanor. . . [and will suffer]
. . ." P.Ex. 135 at 36. Teachers who taught bilingual
"no Spanish rule" (in the Texas State statutes until
jobs and/or revocation of their teaching certificate

when teaching shortages occur, the sta
places. . . [adopted] team teaching. . .'

English as a Second Language ("E
innovative approach to bilingual educat
Part of the instruction takes place in E
teacher can be monoligual in Englis
teaching certificate is required for a tea
227. And, teachers can be trained in ES
five days. *Id.* at 234. A number of exper
that ESL could be adopted as a m
additional enrollment of children o
speaking ability. R. XIII at 211, 244.[2

It should be noted that defendants'
bilingual programs" argument, App.
relevant to 205 out of the 1,100 indepen
in the State of Texas. J.A. at D-64. On
bilingual programs. *Id.*

Defendants briefly raise the issue
classrooms." App.Bf. at 10.[28] Defendan

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[27]The use of bilingual teacher aides is a thir
adopted to accomodate additional enrollmen
Texas State Plan for Bilingual Education, P
utilization of "bilingual paraprofessional aides
teacher in a wide variety of functions. *Id.* a
Brownsville Independent School District testifi
and this "help[s] a lot." R. XXV at 37, 43; *see g*
(testimony of four teachers).

Parents, student teachers from the universit
also be called on to assist in bilingual programs
at C-49-50; D.Ex. 1-42 at 28 (state's e
Community involvement . . . is required at
planning, implementing and evaluating" prog

[28]Defendants cite only one witness on th
Hensley, who did not testify in the trial of this
testimony, P.Ex. 186, it becomes clear th

impact anticipated in "metrop
App.Bf. at 7. Again they c
testimony.

Robbie Collins, an adminis
pendent School District, testifi
historically since 1970 has s
5,000 annual student decline."
are a couple of hundred empty
now." Id. D-39, (emphasis
dependent School District ["
mately 50,000 students in the p

(footnote continued from preceding page)
"immigrant" (i.e. lawful immigrant) cl
clear that his comments concern the
District. *Id.* at 298-300. And, his inf
was obtained from the Superintende
Besterio testified extensively at the t
school buildings in his district. *See, e.*
was to blame for this, he sounded l
Independent School District v. Rodri
that Brownsville did not "have an eq
the State of Texas" J.A. at D-20. And
equalization funds," we're more une
Id. He clearly stated that his distric
with undocumented children." Id.
portantly, Brownsville appears to
problems. Mr. Besterio admitted that
65% of value and could be taxed
education funds. R. XVIII at 204
politically unwise to issue a new bond
2048; App.Bf. at 7 (residents are "tot
to benefit "children that are being a
children lawfully in the school distri

[29]Mr. Collins further testified that
with "less than 87 children . . . and th
J.A. at D-39. Dallas was expecting a
result of an approximate 5,000 stud

15; *see also* D.Ex. 5-18 (HI
30-31 students under capaci
level). An HISD official te
classrooms stand empty in H
was predicting a 4,000 stud
fiscal year 1980-1981. *Id.*

Defendants never establis
size and education opportu
assertions in Appellants' Br
stated at trial that "[t]he res
bare out significant increa
achievement based upon clas
to 15." R. XIX at 2160
professor of education and
that "[t]he addition of a larg
necessarily adversely affect
72.[30] As concluded by the
shown that excluding child
necessary to the improvemer
501 F.Supp. at 583.

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[30]He pointed out that the Sta
additional training to teachers whi
with larger groups of children. R.
effective manager [teachers] w
students." J.A. at D-73. Another
Tipton, has written: "One canno
student ratio . . . Because all teach
amount of time each teacher mu
teaching job varies." D.Ex. 1-
nationally known expert in the fi
quality of the interaction betw
determines the amount of learnin
teacher. R.VI at 253. Echoing a
that "clever management of aides
the largest classroom an exciting
at 253.

(f) Individual and S
Implementation

First, as defendants
severely harmed by bei
R.I. at 184, ¶ 17 (emph
agree with defendants' p
community suffers in
whenever children res
attending school." *Id.*
generally, R. IV at 593
XVII at 1267-68; 501

Evaluating the harm
should be done in light
court finding that they
558. The vast majority
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accompanying text, *su*
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XVI at 1142-43. The
unable to read and una

According to Dr. Ke
and medical director of
Bexar County, childre
tional system will exhi
"hyperactivity, withdr
breaks with reality." J.
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C-17. Unnamed Witne
came to the United Sta
whose mother is a law
States citizen, is alread

184, victimized by
1267-68.

Expert testimony
society itself was
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ILLEGAL IMMIGR
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dangerous, both fo
R. VI at 226.

SUMMA

The plaintiff-chi
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[31]Given the
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228 (1896), a case involving undocumented/deportable immigrants, the Court relied upon *Yick Wo* in finding that the Fifth and Sixth Amendments prevented the enforcement of a law under which a person in the country in violation of the immigration laws could be sentenced to a term of imprisonment at hard labor without the right to a trial by jury:

> In the case of *Yick Wo v. Hopkins,* 118 U.S. 369, it was said: "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . ." [Its] provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or nationality. . ."

163 U.S. at 237.[32]

In *Mathews v. Diaz,* 426 U.S. 67 (1976), this Court stated:

> The Fifth Amendment, *as well as the 14th Amendment, protects everyone* of these [immigrants] from deprivation of life, liberty or property without due process of law [citations omitted]. *Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.*

Id. at 77 (emphasis added), *citing Wong Wing v. United States, Supra.* As noted by the United States Government, given this Court's holding in *Mathews v. Diaz,* "the consequences of finding the Equal Protection Clause inapplicable to [undocumented] aliens might be that they would be entitled to *less* protection from disparate treatment by the

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[32]Supreme Court Justice Field, concurring in part and dissenting in part in *Wong Wing,* stated that "[t]he contention that persons within the territorial jurisdiction of this Republic might be beyond the protection of the law was heard with pain on the argument at the bar." 163 U.S. at 242-43.

states than by the federal government." U.S.Bf. at 32 (emphasis in original).[33]

Plaintiffs are unaware of a single decision which finds that someone or an identifiable group of people are determined not to be "persons" within the meaning of the Fourteenth Amendment equal protection clause.[34] The lower courts have been almost unanimous in concluding that undocumented persons are protected by equal protection guarantees.[35]

(b) Review of the History of the Fourteen Amendment

On December 6, 1885 Congressman John Bingham introduced a joint resolution proposing a Constitutional Amendment which would "secure to *all persons in every*

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[33]The United States Government argues that "aliens who have entered or remain in the United States in violation of federal immigration law and who are present in a state are 'persons within its jurisdiction' for purposes of the equal protection clause of the Fourteenth Amendment." *Id.* at 28-32. *See Also* LAVALLE, EQUAL PROTECTION AND THE EDUCATION OF UNDOCUMENTED CHILDREN, 34 SOUTHWESTERN L.J. 1229, 1232-35 (1981); FLORES, CANE, VELARDE-MUNOZ, RIGHT OF UNDOCUMENTED CHILDREN TO ATTEND PUBLIC SCHOOLS IN TEXAS, 4 CHICANO L. R. 61, 68-71 (1977).

[34]The time has hopefully long passed when courts will serious entertain questions such as whether "a Negro, whose ancestors were imported into this country and sold as slaves . . . become[s] entitled . . . to sue in a court of the United States." *Dred Scott v. Sandford*, 19 How. 383, 403, 15 L.Ed. 691 (1957). As Professor Chester J. Antieau states, the "Dred Scott decision was buried by the Fourteenth Amendment." ANTIEAU, MODERN CONSTITUTIONAL LAW, §15.39 at 708 (1969).

[35]*See, e.g., Castillo-Felix v. INS*, 601 F.2d 459, 461, 467 (9th Cir. 1979); *Frances v. INS*, 532 F.2d 268, 272 (2d Cir. 1976); *Balanos v.*

State . . . equal protection in their rights, liberty, a property. . ." Cong. Globe, 39th Cong., 1st Sess. p. (1866) (emphasis added).[36] In February 1866 Binghar resolution, somewhat revised, was reported out of Committee of Fifteen to the House. *Id.* at 1033. Wh "citizens" were granted "privileges and immunitie "equal protection" was extended "*to all persons in several states. . .*" *Id.* (emphasis added). Debate lasted three days. The term "persons" was often reiterated insure that "equal protection" would be available to " *persons, whether citizens or stangers,* within this land. *Id.* at 1090 (emphasis added).[37] The February resolution not pass the House, but its essential terms were ag introduced in May, 1866. Its purpose remained the sa

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(footnote continued from preceding page)

Kiley, 509 F.2d 1023, 1025 (2d Cir. 1975); *Holley v. Levin,* 529 F 1294, 1295-96 (2d Cir. 1976) *cert denied* 426 U.S. 954 (197 *Williams v. Williams,* 328 F.Supp. 1380, 1383 (D.V.I. 19 *Martinez v. Fox Valley Bus Lines,* 17 F.Supp. 576, 577-78 (M.D 1936); *Herandez v. Houston Independent School District,* 558 S.W 121, 123 (Tex. Civ. App. 1977); *Commercial Standard Fire Marine Co. v. Galindo,* 484 S.W. 2d 636, 637 (Ct. App. Tx. 19 (undocumented workers in Texas have equal protection rights to rec on workmen's compensation claim).

[36]Congressman Bingham, the acknowledged author of Section 1 o Fourteenth Amendment, was a member of the Committee of Fiftee Reconstruction out of which came the proposed Civil Rights Bill of 1 and the Fourteenth Amendment. Regrettably no record of Committee's discussion was kept in its Journal and legislative his must therefore be gleaned from the debates in Congress.

[37]Equal protection was to be afforded all "freedmen. . . refugees. . . all men. . ." *Id.* at 1292; *Id.* at 2543 (". . . the citizen and the strang all men. . ." *Id.* at 1292; *Id.* at 2543 (". . . the citizen and stranger. . ."); JAMES, JOSEPH, THE FRAMING OF THE FOURTEE AMENDMENT (1956) at 90.

> That great want of the *citizen and stranger,* protec
> by national law from the unconstitutional state er
> ments, is supplied by the first section of the amendn
> *That is the extent it hath,* no more. . .

Id. at 2542 (emphasis added). The amendment was m
provide, *inter alia,* "equal protection" to "all persons
[the] borders [of the States]. . ." *Id.* at 1064 (remarks
Hale) (emphasis added).

The full text of the Fourteenth Amendment came
the Senate in May 1866. *Id.* at 1033. Senator
Howard, a member of the Committee of Fifteen, spo
the resolution. While "privileges and immunities"
reserved for "citizens", due process and "*equal pro
of the laws*" were extended to "*any person, whoever
be. . . [That is,] to all persons who happen to be wit
jurisdiction. . .*" *Id.* at 2765-66 (remarks of S
Howard) (emphasis added).[38]

2. A STATE STATUTE WHICH TARGETS DISCRETE GROUP OF CHILDRE BASED ON FACTORS OVER WHIC THE CHILDREN HAVE NO CONTRO AND TOTALLY EXCLUDES THE FROM PARTICIPATION IN THE EDU CATIONAL SYSTEM, SHOULD E CLOSELY SCRUTINIZED

While plaintiffs agree with the district court,
concluded after an abundance of testimony that

[38]The district court in *U.S. v. Otherson,* 480 F.Supp. 1369 (
1979) found that the term "inhabitant" used in Section 2 of
Rights Act of 1866 includes undocumented persons. The dist
opinion and U.S. Government's brief in that case are contain
record. R. II at 213-258.

classification used is wholly irrelevant to the a
of the State's objective", 501 F.Supp. at 583
added), out of an abundance of caution we will sh
challenged statute should be subject to a
"intensified rationality test . . ." *Id.* at 583 n.

(a) Heightened Scrutiny Is Required B
The Challenged Statute Severely Pe
Children For Matters Over Which
Have No Control

Section 21.031 penalizes children because o
mitted by their parents. 501 F.Supp. at 572.
agreed at trial that "*[t]he parties are aware of no*
which undocumented aliens children have c
United States not accompanied by their pa
Trial Order at 14a, ¶17 (emphasis added).
proposed the following findings of fact in the
Brief: "*There is no reason to believe that ali*
come to the United States not accompanied by t
. . . Undocumented alien children seldom have
choose the place of their residence." R. I at 184 (
original).[39] The right to freedom from punish

[39]The district court heard testimony from a nine-year
entered the United States when she was five months old." 5
73. Her father is a United States citizen and her mo
permanent resident. *Id.* She has no culpability for her
country, is probably a U.S. citizen, 8 U.S.C. §1401
excluded from enrollment. *Id.* Defendants' witness R
Superintendent of a border school district testified that h
come across an undocumented child who was respo
decision to enter the United States or who entered unac
his/her parents. J.A. D-29-30. He noted that "Mexican pe
decisions for their children. . ." *Id.*

absence of personal guilt is a well estab
protected by the Fourteenth Amendment.[40] In
tion cases this Court has consistently applied
rationality test when measuring classification
children for acts committed by their parents

The standard of review used has depended u
severity and rationality of the disability su
classified children.[41] In *Jimenez v. Wienber*
628 (1974), Chief Justice Burger, writing for t
invalid under the Fifth Amendment a Socia
provision which conclusively denied benefits
children born after the onset of a parent's d
classification was not justified by a governm
"compelling or otherwise." *Id.* at 632. In *Mat*
427 U.S. 495 (1976), the Court upheld a S
Act classification which presumed eligibili
children while requiring some illegitimat
produce evidence of dependency. The challe

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[40]*See, e.g., Robinson v. California,* 370 U.S. 660
United States, 367 U.S. 203 (1961); *Wieman v. Up*
183 (1952)

[41]In *Levy v. Louisiana,* 391 U.S. 68 (1968), this C
statute which denied illegitimate children the right
wrongful death of their mothers. The Court conc
invidious to discriminate against [illegitimate childre
conduct, or demeaner of theirs is possibly relevant to
done the mother." *Id.* at 72. In *Weber v. Aetna Cas*
406 U.S. 164 (1972), the Court struck down a
compensation statute denying benefits to certain ille
of covered workers. The Court recognized that the sta
has expressed through the ages society's condemnatio
liaison beyond the bonds of marriage. Howev
condemnation on the head of an infant is illogical and u
And, "legal burdens should bear some relations
responsibility or wrong doing." *Id.*

Lucas did not result in a *total* depriv
rational basis test was applied it was not
Id. at 510.[42]

That the plaintiff-children involved h
wrong-doing has already been conced
With regards the reach of the penalty s
concede what the facts at trial establ
insufficient alternative schools to provid
indigent undocumented alien children. . .
school districts do not allow undocument
enroll in the public schools [even] wi
tuition. . ." R. I at 184. A survey of twe
selected school districts in Texas found
mented children enrolled upon the payn
F.Supp. at 555; J.A. at E-66. In sho
suffered by the plaintiff-children in this ca
total deprivation suffered by the child
Weinberger, and *Trimble v. Gordon.*
determine whether the State's objection i
to support the *Rodriguez* only relative di
ing levels for education were involved. T
"no charge fairly could be made that
provide each child with an opportunity t
minimal skills discriminatory classificati
means used are "substantially related"
purpose.

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[42]In *Trimble v. Gordon,* 430 U.S. 762 (1977)
U.S. 259 (1978), the Court again applied an ele
measure the challenged statutes. 430 U.S. at 76
75. Upholding the classification in *Lalli,* the Co
statute in *Trimble,* which excluded *all* children w
by subsequent marriage, the New York law "is
inevitably disqualifies an unnecessarily large nu
at 273.

**(b) Heighten Security Is Re
Challenged Statute Re
Deprivation Of Educatio**

Few would take issue with this Cou
v. Board of Education, 347 U.S. 4

> [t]oday, education is perhaps the
> tion of state and local governments.
> attendance laws and the great exp
> tion both demonstrate a recognition
> education to our democratic socie
>
> *. . . [T]oday it is a principle instr
> the child to cultural values, in pre
> profession training, and in help
> normally to his environment. I
> doubtful that any child may reaso
> succeed in life if he is denied th
> education.*

Id. 347 U.S. at 493 (emphasis added
Norwick, 441 U.S. 68, 75-78 (197
Sisters, 268 U.S. 510, 534 (1925); *M*
U.S. 390, 400 (1923).

Nonetheless, this Court has state
course, is not among the rights affor
under our Federal Constitution." *Sa
School Dist. v. Rodriguez,* 411 U.

[47]The equal protection clause, however,
those rights explicitly recognized in the bo
also those rights or liberties implicitly secur
Shapiro v. Thompson, 394 U.S. 618, 634
446 U.S. 55, 76 (1980). At the time the
originally adopted, the tradition of universal
at government expense had only begun to
However, while the framers of the Constituti
means of providing education, they were n
crucial role of education in the republican g

Rodriguez only relative differer
education were involved. The C
fairly could be made that the sy
child with an opportunity to acq
necessary for the enjoyment of t
participation in the political proc
Rodriguez no children were deni
conduct of their parents or thei

The History of the Fourteent
basic education was one of th
freedmen which the equal protec
protect.[44] The debates on Sec
Amendment, which contained
protection provisions, indicat
intended to prohibit state statute
the education of their white chil
white are taxed alike for that pur
39th Cong., 1st Sess. at App. 21
Senator Howe). On the final da
Henderson of Missouri describe
which necessitated passage of
ment: "The South saw its opport
Negro. . . [and] denied him th

(footnote continued from preceding page)

created. *See* P. SMITH, THE SHAPING
353; C.F. ADAMS, THE LIFE AND W
198; PERKINSON, TWO HUNDRED
TIONAL THOUGHT (1976) at 44. See fo
text, *infra*.

[44]*See generally,* Brief *Amicus Cu*
Association and the League of the
Supporting Appellees, Nos. 80-1538

forced upon him unequal bur

This Court in *San Antonio* noted that close scrutiny may system "fails to provide each acquire the basic minimum s ment of the rights of speech political process." 411 U.S. that the plaintiff-children do r generally they have no lega "right. . . to implement [a employment." App.Bf. at 24 do have a number of impo directly impacted by their ex system.

First, while the plaintiff-chi employment in a handful o "employer sanctions" laws, prohibited the employment fact, the state has frustrated employment of undocument local efforts at similar legisl F.Supp. at 579 n. 88; R. X mented workers are not only

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[4]Subsequent to passage of the construction Act of March 2nd, Confederate states to reapply fo Congress after fullfillment of cert Texas to representation in provisi its constitution's school provision Article IX of the Texas Constitut shall be the duty of the legislat provisions for the support and ma *schools, . . .[for] all the inhabitant* and eighteen years." (Emphasis a

employment, they are
compensation benefits.
Marine Co. v. Galindo

No court to plaintiffs'
Amendment rights of un
v. Wixon, 326 U.S. 13
the First Amendment ri
tion. Nor have the court
to be inapplicable to u
present in the United St
able searches and seiz
Martinez-Fuerte, 428 U
v. Briginoni-Ponce, 42
federal government no
knowledge restricted ac
alienage. *See, e.g., Bola*
26 (2d Cir. 1975); *Unit*
296 (2d Cir. 1975); *W*
1380 (V.I.D. 1971).
undocumented persons
granted under the Due
supra.

The record in these
plaintiff-children are h
Defendants concede th
precluded undocumente
free schools. And that "

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[46]At least two Federal C
mented immigrants are fu
Relations Act. *See Nationa*
583 F.2d 355 (7th Cir. 19
Apollo Tire Co., Inc., 604 F
Rigging, Inc., 202 N.L.R.B
ment Corp., 209 N.L.R.B.

harmed by being denie
precluded from attend
social, educational, p
R. I at 185 (emph
dramatically affect the
now and in the future
rights which are gu
F.Supp. at 561-563. C
this case, and its impa
children, heightened s
Section 21.031.

(c) Heightened
This Case
Totally Ex
tion On Th

A study was take
districts in the State
number of undocum
basis. J.A. at E-65. N
plaintiff-child enrolle

In *San Antonio In*
stated that if elemer
made available only t
"would present a mo
judicial assistance tha
at 25 n. 60. That set
case.[47]

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[47]There is "no evidenc
schools in those districts
tuition." 501 F.Supp. To
children live in school

Earlier decisio
based on wealth
McMillan v. Bo
802, 807 (1969)
U.S. 663, 668 (
(1972) this Cou
for primary elect
like access to the
is no alternative

Cases involvi
parallel this cas
deprivation.[49] Si
this Court has c
in total depriva
Antonio Indep
disabilities need
ability to pay in c

(footnote continue

payment of a tuition
at A-9-10; P.Ex. 1
120, 129 and 140, 1
large part due to "a
1197. The U.S. Ci
south Texas for the
in the United State

[48]Defendants con
to provide an educ
184, ¶21.. School
children excluded f
R. XIX at 2255.
children and due to
them away." R. XI

[49]*Tate v. Short*, 4
235 (1970); *Dougl
Illinois*, 351 U.S.

U.S. at 22, t
burden but ra
interest based
ingly, Section

**(d) The
Ex
Mi
Sol**

First, it sho
"illegal alien
brush and inc
One, a child
laws. *Supra*
children who
being a "mon

The paren
exploitation i
demand for c
to imagine a
States more
State of Tex
purposefully
Dist. v. Rod
indicia of sus
with such di

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[59] "[U]ndocun
charged at comp
conditions." J.
taken advantag
politically." R.

purposeful unequal treatment, or relegated to such a position of political callousness as to command extraordinary protection from the majoritarian political process." *Id.; United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n. 4 (1938). The plaintiff-children are politically powerless and "saddled" with awesome disabilities suggesting the appropriateness of heightened scrutiny in this case.[51]

3. THE CLASSIFICATION CREATED BY SECTION 21.031 IS TOTALLY UNRELATED TO THE ACHIEVEMENT OF A LEGITIMATE STATE PURPOSE AND IS THEREFORE WHOLLY IRRATIONAL

Texas offers two justifications for enactment of Section 21.031. They argue that a "principal justification" for exclusing children from the public schools is "prevention of inducements for illegal entry." App.Bf. at 28. They further argue that "preservation of the State's limited educational resources and the dedication thereof to lawful residents" constitutes an important state interests. *Id.* at 25. As the

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[51]This Court recognized in *Graham v. Richardson*, 403 U.S. 365 (1971) that "classifications based on alienage. . . are inherently suspect and subject to close judicial scrutiny." *Id.* at 372. In more recent decisions this Court has held that state schemes barring immigrants from performing functions "that go to the heart of representative government" need only satisfy the rational basis test. *Ambach v. Norwick*, 441 U.S. 68, 74 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978). However, access to a public education cannot seriously be compared with "participation in the political process. . ." *Sugarman v. Dougall*, 413 U.S. 634, 648 n. 13 (1973). The plaintiff-children are generally unable to modify their immigration status, and this is particularly true given the lengthy delays, up to seven years, in the processing of immigration applications. J.A. at C-30.

lower courts have found, Section 21.031 bares no relationship whatsoever to these claimed purposes.

(a) Section 21.031 Bares No Relationship To The Purpose Of Preventing Illegal Migration Into Texas

Defendants come to this Court claiming that a "principal" justification for Section 21.031 is "prevention of inducements for illegal entry." App.Bf. at 28. Yet, defendants straight-forwardly informed the district court that "*[u]ndocumented aliens do not come to the United States in search of a free education—if they did, they would not come to the State of Texas which is the only state in the country which excludes alien children from public schools.*" R. I at 184-85, ¶23 (emphasis in original). The Texas Attorney General informed the district court in *Plyer* that "the basis behind our statute. . . [is] not an effort to control immigration. . ." J.A. at, A-63.

Dr. Wayne Cornelius, probably the foremost expert on the question of Mexican migration into the United States, has concluded that "[t]here is no evidence whatsoever that the availability of health care *or any other kind of public service in the United States* is an important incentive for Mexicans contemplating a move to the United States. Their motives are overwhelmingly income, job, and family-related. They come to the United States to work and get ahead, not to consume public services." P.Ex. 455 at 46 (emphasis added). This observation is corroborated by the multitude of both governmental and private studies which have shown the extremely low number of undocumented immigrants who have children in public schools in this country. *See* footnote

12 and accompanying text, *supra.* Studies have clear shown that undocumented immigrants neither come to t United States because of the existence of social services n do they utilize those services once resident in this country It is wholly irrational for Texas to attempt to discoura illegal migration into the state by excluding innoce children from its public schools while encouraging the infl of undocumented workers to satisfy its "insatiable dema for cheap labor. . ." R. V at 57-58; R. XXVI at 150; P.E 436 at 172.[53]

(b) The Classification Created By Section 21.031 Is Wholly Irrelevant To The Preservation Of Educational Opportunities For Those Lawfully In The Country

Defendants argue that Section 21.031 is rationally relat to the purpose of preserving "that State's limited resourc for education of its lawful residents. . ." App.Bf. at 2 However, as the district court concluded, "the State has n

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[52]J.A. E-41 at 87 (none found on welfare; 1% receiving social secu benefits; none receiving unemployment benefits); P.Ex. 210 at 41 (receiving welfare and 10% receiving unemployment benefits); J.A. E (3.2% receiving welfare); P.Ex. 438 at 133? (0.16% receiving welfa P.Ex. 205 at 18 (2.8% receive welfare; 1.6% receive food stamps; use free medical clinics); P.Ex. 455 at 26-27 (2.3% receive welfare; receive food stamps; 3% use free health care); J.A. at E-15-19 at (U.S. Comptroller General studied 45,000 welfare files in 9 major ci thought to contain high populations of undocumented immigrants found 0.3% receiving welfare).

[53]Aside from the irrationality of this stated purpose, plaintiffs belie is impermissible. While a state may reasonably enact laws impactin migration in order to remedy local interests of great importa *DeCanas v. Bica,* 424 U.S. 351 (1976), it may not legislate for the

shown that excluding children from school is in an necessary to the improvement of the education in the S 501 F.Supp. at 583.

(i) Implementation Of Section 21.031 Ha Had No Impact On The Education Opportunities Available To Childre Allowed To Enroll In The Texas Publ Schools

The Commissioner of the Texas Education A testified that no studies were conducted by either his a or the Texas legislature prior to the enactment of the concerning the possible adverse impact of allowing u mented children to attend the public schools. R. X 1272-73. And, he knew of no data which show academic performance of citizen children had im subsequent to the enactment of Section 21.031. *Id.* at A TEA official responsible for monitoring implemen of Section 21.031 testified that his agency had no d how many children were excluded from the public sch a result of this statute. J.A. at C-52. In short, factual s for the relationship between enrollment of undocur children and the academic performance of citizen chil

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(footnote continued from preceding page)

purpose of discouraging migration or encouraging the migr undocumented persons out of its territory and into other state Court has observed that the "power [over immigration] is veste national government to which the constitution has committed th control of international relations, in peace as well as in war." *United States,* 142 U.S. 651, 659 (1891). The passage of law concern the admission of foreign nationals "belong to Congress to the States." *Chew Lung v. Freeman,* 92 U.S. 275, 280 (187 statute challenged here is made all the more offensive by its fa closely track federal immigration laws. 501 F.Supp. at 565 n.

wholly lacking. Raul Beisteiro, Superintende
Brownsville Independent School District, on
"enclaves" where defendants assume undo
children will concentrate, App.Bf. at 10, candidl
that he had "no way . . . of telling what the real i
be" if the alienage provisions of Section 21.031
unconstitutional. J.A. at D-29, R. XVIII at 207

Quoting lay witnesses, defendants suggest to
that "illegal aliens are generally lower in e
capabilities than legal immigrants." App.Bf. at 9
note 24, *supra.* In contrast, defendants advised t
court that "*[t]he educability of a child is a functio
her prior education and cultural background
function of immigration status.*" See R. I at 183
in original). And, "*[w]hether or not a stud
bilingual education is a function of their abilit
write and speak English and not of their im
status.*" *Id.* at 184 (emphasis in original). These
findings of fact were totally supported by the
admitted at trial.[55] In short, "[n]othing about thei

[54]The State's assumption concerning the potential i
documented children on the public schools was based on
the number of undocumented children residing in Texas. 5
575. Defendants informed the district court that approxima
undocumented school-aged children resided in the State. 5
576 n. 69. After hearing from five expert witnesses, a
various studies the district court concluded that this
"bizzare and untenable. . ." *Id.* at 576. The lower court
findings of various demographers who placed the nu
proximatelly 20,000. *Id.* at 577. In fact, a much lowe
plaintiff-children have enrolled in the public schools. *Se
supra.*

[55]*See generally* Footnote 24 and accompanying text, s
tional needs of undocumented children and documer
"essentially the same"); R. XIII at 205; P.Ex. 185 at 60, 9

tion status distinguishes [the plaintiff-childre
children in terms of their education needs." 5
583.

The trial evidence likewise negates any
enrollment of the plaintiff-children would
classrooms. App.Bf. at 10. In the Dallas
School District "there are a couple of hundre
rooms . . . right now." J.A. at D-39. In
Independent School District approximately 1
stand empty. R. XXVI at 68.[56] Furthermo
never established the current levels of class siz
of Texas, nor the relationship between class si
tional opportunity. In fact, defendants expert
at trial that "[t]he research on achievement do
significant increases or decreases in studen
based upon class sizes until you get to les
R. XIX at 2160-61; J.A. at D-37.

When defendants' expert witness on educ
tunities was asked whether he could say tha
tion of Section 21.031 had resulted in an i
quality of education in Texas, he replied "[n]
XXII at 48. The district court found that defe
it to assume "without any credible supporting
enrollment of the plaintiff-children would ha
impact on the quality of education. 501 F.Sup

(footnote continued from preceding page)

(many plaintiff-children have been in this country virt
lives and have only attended schools in this country); R.
differences between the problem of Mexican-Ameri
undocumented children); R. I at 101-103 (needs o
children a reflection of the length of residence in the c
their immigration status); J.A. at B-40 ("alien child
perform at levels much higher than American-born mi

[56]*See* Footnote 29 and accompanying text, *supra*.

lower court correctly assessed the evide
cluded that

> [t]he State has not shown that excludin
> school is in *any way* necessary to the
> the education in the State. . . The *class*
> *wholly irrelevant to the achievement*
> *objective. McGowan v. Maryland,* 366
> 26, 81 S.Ct. 1101, 1104, 1105, 6
> (1961). . .
>
> . . . The Court has concluded that
> rationality test is appropriate becau
> penalizes children in the absence of indi
> bility or wrongdoing. *Supra* at 572-5
> approach, the means used by the
> substantially related to the achievemer
> mental objective. *Here there is no relat*
> *the classification and the objective*
> *capricious and irrelevant. . .*

Id. (emphasis added).

**(ii) Texas Has Shown No Ratio
ship Between Implementatio
21.031 And A Fiscal Savings
tively Affects Educational O**

Defendants discuss, in very general
impact of Section 21.031 on the financing
State. App.Bf. at 7. The evidence d
however, that "the State or the school
necessary funds." 501 F.Supp. at 579.
State have the money to educate the pl
more importantly failure to educate t
advantage to citizen children—they still h
$800/year spent on them by the State
existence or non-existence of Section 2

Texas enjoys a healthy economy. 5(
XVI at 1112. "On August 31, 1979
showed a closing cash balance of $2.
increase above the $2.08 billion c
beginning of the year." P.Ex. 204 at
The growth in Texas' personal income
that of the nation as a whole. *Id.* at 1

The bulk of the State finance is de
taxes, primarily State Tax. R. XIX
1113.[57] Revenues raised by the State
funds, each fund showing a massive s
balance in the General Revenue Fun
for the Highway Motor Fuel and
$29,512,000, for the Omnibus T
$81,785,000, and for the Perma
$714,124. P.Ex. 300; 501 F.Supp. a

TEA's Foundation School Program
which funds provided by the State Leg
to the independent schools districts. P.
total 1979 Foundation School Prog
$2,106,376,925, "32.5% was suppo
School Fund, 19.3% by the Foundati
48% by the General Fund." P.Ex. 20

---

[57]The evidence clearly established that t
children, even when undocumented, contrib
payment of taxes and as consumers contribu
See, Footnote 18 and accompanying tex
(Defendants' Proposed Findings of Fact: "
reside and work in the State of Texas are
federal tax requirements.")

[58]The district court noted that these surplus
completely the education of all undocumente
the State correctly estimated the number of
children" at 120,000. 501 F.Supp. at 580.

Fund is the "major State operati
exercise wide discretion in
deposited in this fund . . ." P.Ex.
termed "automatic financing", t
used for educational expenses if
in the Available School Funds,
Fund. *Id.* at 116. Monies go
districts from the Available Sch
previous year's Average Daily
XIX at 2223. The Foundation S
the basis of current average da

> Once the funds in the Found
> able School Fund] have been
> obligations of the State for
> Program, *there is an auto*
> *General Revenue Fund to m*
> *State under the program.*

R. XVI at 1116 (emphasis adde
Upon additional enrollments
school district can adjust their
additional funding from TEA.
111-112. To the extent that t
available in the Foundation Sch
School Fund, there is an *autom*
Revenue Fund. TEA "has a pr
treasury [i.e. the General Rev
draw is *only about seven hundr*
J.A. at D-47 (emphasis added)

In short, local independent
ticularly the poorer districts, in
tion by *increasing* their Avera
are harmed rather than helpe
resulting from implementatio

generally Appellees' Brief on
(consolidated case) at Section
plaintiff-children need not de
funds available per student at
Texas currently spends appro
attendance. J.A. at D-49. There
children were to enroll in the T
million cost involved could eas
$620,350,053 surplus in the G
conceded by defendants' counse
the state of Texas doesn't have
78-79. "Texas can come up w

In *Shapiro v. Thompson,*
Court stated that a state "cou
expenditures for education by b
its schools." *Id.* 633. The co
certainly not a compelling s
Richardson, supra, 403 U.S
Thompson, supra, 394 U.S. at
children from an education doe
which serves to improve the
available to children currently
schools. From a fiscal standpo
justified by a State interest,
Jimenez v. Weinberger, supra

**(iii) The Long-Term C
Children And The
tion 21.031 Mak
Wholly Irrational**

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[59]The Foundation School Progr
$2,106,376,925. P.Ex. 204 at 11
appropriate additional funds from the
attend the public schools (assuming

Attempting to justify Se
analysis is made all the m
long-term costs to the State
by implementation of Sec
apparent permanent reside
educating the plaintiff-chil

Dr. Kenneth Mathews te
educated, were likely to ult
the criminal justice system,
system, or over-represente
22. The district court in *Ho*
(D.D.I. 1970), reviewing
undocumented children fro
that "[in] the public interes
be avoided . . . [It is] manif
to] develop and foster a
numbers of untutored an
roaming the streets. . ." *Id.*
government:

> The children that illeg
> States, although lacking
> themselves as American
> dreams of upward mobili
> *educational opportunit*
> *skills will not be comme*

(footnote continued from preceding
would reduce the Foundation Sc
per pupil expenditure *may* be
generally 501 F.Supp. at 580.

[60]As already discussed, both
that the plaintiff-children are he
"family reunification in the Uni
of the parents of undocumente
90% intended to eventually se

Such a mismatch co
lems and political pr
illegal immigration u
produce a second ge
frustrated young pe
producing hostilities
those of the 1960's.

*H*OUSE *S*ELECT C*
*L*EGAL AND *I*LLE*
*U*NITED *S*TATES, 9
(emphasis added).[61]

The district court has
the plaintiff-children ex
F.Supp. at 561-62 (the
that the damage caused
United States Commis
Boyer: "[A] man or wo
word is isolated from th
in a tiny world of narro
from the benefits of lif

Given the long-term
tion of Section 21.031,

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[61]The State of Texas
education by requiring the l
suitable provisions for th
system of public free school
Texas legislature has there
institution to provide "eq
within its jurisdiction or geo
Code § 1.04(c) (1978 Sup
school-age is required to
residence. . ." D.T.C.A. E
also imposes criminal pena
school in accordance with t
§ 4.25.

not reasonably be c
McGowan v. Ma
classification creat
reasonable empiri
Lucas, supra, 427
"illogical and unjus
Co., supra, 406 U

3. SECTION
STANTIVE
TEENTH
THE PLAI

Equal protectio
dependent and dist
guarantees of these
many infringement
protections afforde
Virginia, 388 U.
focuses on protec
mental to every ind
procreation, contra
rearing and educati
53 (1973). Where
interests, this Cou
against the state

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[62]Defendants concec
undocumented immigr
Fourteenth Amendme
clusions of Law); *M*
undocumented plaintif
panoply of rights a
Amendment's due pro

Griswold v. Co

In *Meyer v.* that "[w]ithout Fourteenth Am useful knowledg "established dc legislative actio relation to son State. . ." *Id.* at *people have alw knowledge as n be diligently pr*

In *Pierce v.* down a state st 286 U.S. at 57 205 (1972). Th public schools r State." *Id.* 406 (1975) the Co

---

[5]The majority c *v. new York,* 198 continued to rely *Pierce v. Society o* similar analytic fr can perhaps be rec realm of family lif and *Pierce* is of gre protected in *Loch* 494, 499 (1977).

[6]Examining the may do much, go citizens, physicall Court concluded "means adopted" homogeneous pec

interest . . ." *Id.* at 574. So fundamental is the liberty interest in education that the denial of access to knowledge and benefits of education also treads on First Amendment rights. This Court stated in *Griswold* that

> [t]he association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.
>
> By *Pierce v. Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyers v. Nebraska, supra,* the same dignity is given the right to study the German language in a private school. In other words, *the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.* . . Without those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

Griswold v. Connecticut, supra, 381 U.S. at 482-83.[65] The liberty interest harmed in this case is "of supreme im-

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[65]In this case the liberty interest in access to an education is heightened by Article VII, § 1, Texas Constitution, which provides that "[a] general diffusion of knowledge being essential to the liberties and rights of people, it shall be the duty of the legislature of the State to establish and make suitable provisions for . . . the maintenance of an efficient system of public free schools." *See also* footnote 61, *supra.*

In 1954 Chief Justice Justice Warren stated: "Compulsory school attendance laws and the great expenditures for education both demonstrate a recognition of the importance of education to our democratic society." *Brown v. Board of Education,* 347 U.S. 483, 493 (1954).

portance. . ." *Meyers v. Nebraska, supra,* 262 U.S. at 400. The importance of this liberty was articulated at the time of the framing of our Constitution and during formulation and passage of the Fourteenth Amendment. *See,* text accompanying footnote 44, *supra.*

Against the deprivation suffered by the plaintiff-children this Court will "examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulations." *Moore v. City of Cleveland, Ohio,* 431 U.S. 494, 499 (1977).[66] In this case it cannot even be said that the State has established "an ascertainable purpose and . . . a rational means to achieve that purpose. . ." *Id.* 431 U.S. at 547 (White, J., dissenting).

This Court should reject defendants' claim that a "principle" justification for Section 21.031 is "prevention of inducements for illegal entry." App.Bf. at 28. Defendants themselves took the *opposite* position in the district court, claiming that "undocumented aliens do not come to the United States in search of a free eduation—if they did, they would not come to the State of Texas which is the only state in the country which excludes alien children from public schools." R. I at 184-85. Defendants also stated that "the

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[66]The scope of the inquiry into the State's interests and the means pursued to achieve the interests apparently depends on the relative importance of the interests balanced in a particular case. A teacher facing loss of employment must show "that there is no rational connection" between the governmental interest and the means used to achieve that interest. *Harrah Independent School Dist. v. Martin,* 440 U.S. 194, 198 (1979). However, when important "liberty interests" are at stake, the "usual judicial defference to the legislature is inappropriate." *Moore v. City of East Cleveland, Ohio, supra,* 431 U.S. at 499. The Court will examine "the importance of the governmental interest advanced and the extent to which they are served by the challenged regulations." *Id.*

basis behind our statute . . . [is] not an effort to control [immigration]. . ." J.A. at A-63. In any event, plaintiffs have already argued that such a purpose would be impermissible. *See* Section 3(a), *supra.*

While the State may have a legitimate purpose in preserving its "limited resources for education of its *lawful* resident", App.Bf. at 26 (emphasis added). even this purpose should be impermissible if the State does not define "lawful" in a manner consistent with federal law, or if implementation of the statute involves so much "over inclusiveness or under inclusiveness", *Craig v. Boren, supra,* 429 U.S. at 226 (Rehnquist, J., dissenting), such that the challenged statute only "marginally" serves the stated interests. *Moore v. City of East Cleveland, Ohio, supra,* 431 U.S. at 500.

Section 21.031 is dramatically over and under inclusive. By its terms it does *not* exclude from the public schools a child who entered the United States legally but who is under a *final* order of deportation requiring departure from the United States on a date certain in the future. On the other hand, as has already been fully discussed above, it excludes children who are here to stay like Unnamed Witness No. One. 501 F.Supp. at 573 (the child of a United States citizen and a lawful permanent resident). As noted by the district court, defendants' use of the term "lawfully admitted" is a "monument to ambiguity." *Id.* at 565 n. 39.[67]

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[67]The district court incorrectly notes that the Texas Education Agency "has promulgated guidelines" for the implementation of Section 21.031. At least one *amicus curiae* in support of defendants makes their argument on the basis of this error. Brief of *Amicus Curiae,* The Legal Foundation of America, at 7 ("one must examine the regulations promulgated by the Texas Education Agency"). In fact, as candidly noted by another *amicus curiae* brief in support of defendants, the State

To the extent that Texas wishes to insure that only *bo*
fide residents enroll in the public free schools[68] Sect
21.031 contains the necessary language to achieve t
legitimate interest without prohibiting the plaintiff-child
from access to an education. 501 F.Supp. at 554. T
Section 21.031 has but a tenuous relation to alleviation
the conditions mentioned by defendants is obvious from
fact that it totally excludes "[m]any" children from acces
an education who "are not deportable." 501 F.Supp. at 5

(footnote continued from preceding page)

has only "proposed" regulations interpreting Section 21.031. Bri
Amicus Curiae, Texas Association of School Boards in Suppo
Appellants at 13; while the Legal Foundation of America states tha
regulations have been "promulgated", *Id.* at 7, these "guidelin
reproduced as Appendix "A" in their brief, clearly state that they
"proposed. . ." *Id.* at A-2. A child like Unnamed Witness No. (
would not qualify for enrollment even under these proposed guideli
See R. XII at 5-6, 9-11, 13 (Immigration Counselor with approxima
112 "open" cases similar to that of Unnamed Witness No. One).

[68]At least three *Amicus Curiae* briefs in support of Texas suggest
the alienage provisions in Section 21.031 were enacted to create
objective measure" of *bona fide* residence in the State. Brief of *Am*
Curiae, The Legal Foundation of America at 11; Brief of *Am*
Curiae, Texas Association of School Boards at 8-9, 11; Brief of *Am*
Curiae School Districts, Harlingen Consolidated Independent Sc
District, etc., at 7-9. First, defendants themselves have never sugge
this purpose in any court proceeding. Second, such a purpose woul
wholly irrational in that non-residents can enroll in the Texas sch
upon the payment of a tuition. However, Texas *does not* require sc
districts to admit the plaintiff-children even upon payment of tui
many school districts do not allow enrollment of the plaintiff-chil
even with the payment of tuition. 501 F.Supp. at 555; R. V at
(Defendants' proposed Findings Of Fact). Third, the resid
provisions of Section 21.031 apparently worked well to exc
undocumented non-resident children prior to 1975. 501 F.Supp. at
n. 15 and accompanying text.

n. 103.[69] It cannot be said that Section 21.0 "marginally" services the State's asserted interest "has not shown that excluding children from school way necessary to the improvement of the educatio State." 501 F.Supp. at 583. The due process claus not tolerate a State law which totally precludes ac public education on the sole basis of immigratio while the State concurrently admits that the "*educa child is . . . not a function of immigration status.*" R (Defendants' Proposed Findings of Fact) (emp original).

4. SECTION 21.031 IS PREEMPTED AS CONFLICTS WITH AND FRUSTRAT FEDERAL IMMIGRATION POLICY

The doctrine of federal pre-emption has long vehicle by which state legislation may be struck do invalid encroachment upon an area of federal respo or concern. Such judicial action is a remedy to conflict between state and federal statutes or state an area normally reserved to the exclusive contr federal government. *De Canas v. Bica,* 424 U (1976).

In a "conflict" analysis, the state law is examined to ascertain whether it stands as an obstacle to the

[69]An alternative and far less burdensome approach for T have been to exclude children under final, non-reviewable deportation from enrollment in the public free schools. *See,* CONG. REC. S12286 (Daily Edition, Sept. 10, 1979) (on "legally" within the country eligible for services under Services Corporation interpreted to mean persons who have due process" deportation hearing and "a final determination h been reached" as to their deportability).

ment of a federal purpose. *Perez v. Campbell*, 4(
(1971). *De Canas* involved a challenge to a
statute which prohibited the employment of imm
entitled to lawful residence in the United Sta
LAB. CODE §2805 (West Supp. 1976). In a
opinion, this Court found no indication of a fede
preclude state regulations of "the employme
aliens. . ." 424 U.S. at 358. However, the Cou
the case to the California courts for determinatio
Section 2805 " 'stands as an obstacle to the acco
and execution of the full purposes and objecti
gress' " in enacting the Immigration and Nationa
at 363, quoting *Hines v. Davidowitz*, 312 U.S.
In this case the conflict is clear. Section 21.0
from the public schools children who "are not c
501 F.Supp. at 583 n. 103. And, experts testifi
most unusual for the Immigration and Na
Service to initiate deportation proceedings a
dren." *Id; see generally*, R. XIV at 632-84 (t
Immigration Judge J.R. Smith).

Unnamed Witness No. One, the daughter
States citizen and lawful permanent resident
mentable." 501 F.Supp. at 573; 8 U.S.C. §1

---

[10]In contrast to the facts present in this case, the Cou
took note of the "vital state interests," *Id.* at 357, and that
was "tailored to combat effectively the perceived evils."
remanded despite the finding that the State law prohibite
"only with respect to individuals whom the Federal G
already declared cannot work in this country." 424
nevertheless, "there are questions of construction of §
settled. . ." *Id.* The question remained unanswered whet
prevented employment of migrants who, although not en
residence in the United States, "may under federal law
work here?" *Id.* at 364.

she may well be a United States citizen. 8 U
Former Immigration Service Commis
Castillo, correctly testified that the chances
deported from the United States are "remo
73-74; *see* 8 C.F.R. §242.5(a)(3) (childre
and certain immigrants allowed to remain
the American Consul is ready to issue an
The United States Government now takes
Section 21.031 is not, on its face, incor
Immigration and Nationality Act. U.S.
However, they "assume" that Section 2
exclude from enrollment children "permit
law to remain in the United States." *I*
assumption is not supported by the record.
supra; see also R. XVII at 1322 (Commis
tion states that Section 21.031 "is clear a
that the child must be legally in this cour
(Texas Education Agency not able to kee
decisions).

Defendants agree with a plaintiff wit
children . . . return to Mexico when they
education or the instruction they need" in T

---

[7]The United States Government states that Sect
empted, "at least to the extent that local school dist
federal law in determining whether an alien child is
alien' for purposes of his/her entitlement to be adm
without payment of tuition." *Id.* at 15-16. The re
failure in this regard. School officials, both repre
local districts consistently testified that they knew
immigration laws. *See e.g.*, R. XVIII at 2075 ("
right to do whatever they please"); J.A. at C-55
have its own policy"), J.A. at 60 (a child in deport
not yet found deportable "ineligible" to attend sc
(school district can implement Section 21.031 "

12-13. Given that many of the plaintifl
deportable", 501 F.Supp. at 583, the
clearly conflicts with federal immig
policy. Despite their belated efforts to br
more in line with federal policy, *see* foot
classification created by the challenged
conflict with federal law. Children are
public schools even though federal regu
continued presence in this country. Sect
be pre-empted under the authority of *D*

5. SECTION 21.031 IS PRE-EMI CONFLICTS WITH AND FR FEDERAL EDUCATION POI

The district court noted that "[t]here
Texas enrolls undocumented children"
student record transfer system, a federal s
of the Elementary and Secondary Educ
("ESEA"), 20 U.S.C. §§2761-2763,
ceives money for education from the f
because of the presence of children who
school." 501 F.Supp. at 586. This "wind
achieved at the expense of the other 49 st
migrant children. This result directly frus
objective of Title I—to provide aid to sch
are truly impacted by concentrations of lo

---

[72]Should this Court believe that the present r
resolve this question, a remand would be a
DeCanas v. Bica, supra, 424 U.S. at 364-65; *T*
Chrysler Motors Corp., ____ U.S. ____ , 49
(May 18, 1981).

cationally-deprived children. 124
(August 23, 1978).

The Title I Migrant Program, 20 U
sub-program within the Elementary
tion Act, involves an on-going effort
the education of every migrant chil
States. 501 F.Supp. at 586. In acco
funding formula, the number of migr
the federal Migrant Student Rec
("MRSTS"), a national computer s
residing within a state during a giv
amount of Title I migrant program f
that state. Federal Register, Appe
52686 (November 13, 1978). Def
mented children in the MSRTS, wit
immigration status when completin
forms. J.A. at C-80. Texas receive
funds than any other state in the cou
of the national federal appropriation
their counting of undocumented chi

One of the primary purposes
Program, is to provide "continuit
migrant children. 3 *U.S. Code Co*
(1974). The undocumented migrant
in a unique position when his parent
he will be counted for purposes of th
funds, the continuity of his educati
Furthermore, the economic "win
State of Texas, takes place at the exp
(and migrant children throughout th
in the federal program.[73] Section

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[73]In 1915 Congress enacted the Impact
seq. As the historical predecessor of the

obstacle to achievement of the p
Migrant Program. *Hines v. Dav*
57.[74]

6. SECTION 21.031 DEP
TIFF-CHILDREN OF
WITHOUT PROVID
PROCEDURAL DUE
GUARDS

In *Goss v. Lopez*, 419 U.S
mandated that a short suspensi
purposes must be proceeded b
signed to prevent erroneous ex

Among other things, the Stat
nize a student's legitimate

(footnote continued from preceding page)

identical policy concept of making fede
school districts to supplement state a
"impact" addressed was the effect of
and employees within a school district,
existence of educationally disadvanta
I. State laws, enacted subsequent to Im
the deduction of federal funds from
otherwise would have been allotted by
districts have been uniformally held to
Clause as a manifest frustration of
Carlsbad Union School Dist. v. Raff
1969), *aff'd.* 429 F.2d 337 (9th Cir.
F.Supp. 1244 (D.Neb. 1969); *Herge*
251 (D.Kan. 1968); *Douglas Ind.*
F.Supp. 849 (D.S.D. 1976); *Shepar*
(E.D.Va. 1968).

[74]Plaintiffs' educational pre-emptio
in their Post-Trial Brief, Constitution
281 (therein at 92-102).

education as property int
Due Process Clause and
for misconduct without
procedures required by

Id. 419 U.S. at 574. Tho
attending the public scho
21.031 and subsequently h
an education. Others are p
the first time. The same
regardless of the circumst

It is necessary to look
defined by state law to dete
legitimate [claim of] entitle
state law mandates atten
schools, and school distric
educational services to all
and 65, *supra*. There is
school in the State of T
Agency should not be per
without some form of pric

Having created a legit
expectancy of benefits, def

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[7]In *Goldberg v. Kelly*, 397
denied public assistance benefit
of the statute authorizing pa
determined to withhold a benefi
a due process hearing on their el
in *Board of Regents v. Roth*, 4

> The welfare recipients in G
> entitlement to welfare paym
> defining eligibility for them.
> they were, in fact, within the
> But we held that they had a
> attempt to do so.

Id. 408 U.S. at 577.

due process applicatio
titlement.[76] The likelil
substantial given defen
complex body of federal
of training that school
matters, and the lack
pendent school districts
interpreted. At presen
procedures for excludin

Q. Let's say the pers
Mr. Besterio, I v
Immigration Serv
marriage certificat
going to give me
person have any

A. No.

Q. Do you recall ma
[testimony]. . .
attendance office.
really, you know,
I've got to get rea
that I give them tw
call the border pa
and *I don't thin*
anything because
That's the law of
here." Do you re

A. Certainly.

---

[76]In *Greenholtz v. Nebras*
Court held that "the quantu
situation depends upon the
risk of error." *Id.* at 13. A
protected property for liberty
of notice and . . . *some* kind
at 579; *Mathews v. Eldrid*

Q. Do you also
"My intervie
give them fiv
the authoritie
am a firm be

A. Sure.

Q. Is that what

A. Well, *I do*
procedural
here]. . .

J.A. at D-28 (emp

It is unlikely tha
standards of *Goss*
constitutional, ther
due process mech
"five minutes" to
officer makes his '

Without mass li
democracies coul
French Attorney
Education:

> Educators are p
> people to read
> only to draw an
> of society dema
> should not exce
> tion. . .

P.Ex. 301 at 56.

which smacks of
According to St
uses "a lot of u
fields. . ." R. XX
the fields" know

In every chi
circumstances,
tentiality of the
priceless comm
recognized by
withhold this co
toil in its fields
children's paren
citizens and law
conceded throug
stay. Not very l
maintained in a
optimum of di
FRANKLIN, FRO
Texas perhaps h
McCarthy testif

> We are keepi
> manufacturin
> society ten ar
> We are man
> society is to b
> means for ma
> crime. . . [W]h
> increases in t
> . . . in terms of
> will pay this

R.Vol. XII at 1
fails to recogni
destined to play

intentionally designed to create an identifiable group of people, a minority within a minority, who will be illiterate and easily exploitable in the coming years.

The rulings of each of the lower courts should be affirmed.

Respectfully submitted,

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Office - Supreme Court
FILED
OCT 28 19
ALEXANDER L. ST

No. 80-1934

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

IN RE: ALIEN CHILDREN EDUCATION LITIGATION, STATE OF TEXAS and TEXAS EDUCATION AGENCY,
Appellants

v.

UNITED STATES,
Intervenor-Appellee

and

CERTAIN NAMED and UNNAMED UNDOCUMENTED ALIEN CHILDREN,
Appellees

On Appeal from the United States Court of Appeals for the Fifth Circuit.

BRIEF OF
American Friends Service Committee
United Church of Christ Board of Homeland Ministries
The General Board of Church and Society of the United Methodist Church
National Board of Jesuit Social Ministries
The Lutheran Council in the U.S.A.

AMICI CURIAE
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Attorney for Amici
110 Fayette Street
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THE LEGAL INTELLIGENCER, 10th & SPRING GARDEN STREETS, PHILA., PA 19123 (215) 236-2000

MOTION FOR LEAVE TO FILE

The following organizations respectfully move
leave to file the attached brief as *amici curiae* in supp
of the Appellees in this case:

American Friends Service Committee
United Church of Christ Board of Homeland Min
tries
The General Board of Church and Society of t
United Methodist Church
National Board of Jesuit Social Ministries
The Lutheran Council in the U.S.A.

In support of the motion Amici state:

1. The issues involved in this case, whet
undocumented aliens are entitled to equal protection
the laws and if so, the extent of such protection, v
have a far-reaching impact on many individuals w
whom the *Amici* work daily. *Amici* believe that the sta
has been set for an erosion of the progress made by
people of Mexican ancestry, citizens and aliens. *Am*
believe that this court should include in its analysis
the application of the equal protection clause the hist
cal discriminatory and exploitative treatment of Me
cans and Mexican Americans in this country. For
most part *Amici* have confined themselves to this iss

The consent of the attorneys for all parties in t
case has been obtained and letters to this effect ha
been forwarded to The Clerk of the Court.

Respectfully submitted,

Joyce D. Miller
110 Fayette Street
Bridgeton, New Jersey 08
(609) 455-2304
Attorney for Amici

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tional Equality", 61 *Va. Law. Re*

No. 80-1934

IN THE
SUPREME COURT OF THE

October Term 1

IN RE: ALIEN CHILDREN EDUC
STATE OF TEXAS and TEXAS EI

v.

UNITED STATI

and

CERTAIN NAMED and UNNAME
ALIEN CHILDR

On Appeal from the United State
the Fifth Circuit

BRIEF OF

American Friends Service
United Church of Christ E
Homeland Ministries
The General Board of Chu
the United Methodist Cl
National Board of Jesuit S
The Lutheran Council in

INTEREST

1. American Friends Servi

The American Friend
1917 been active in worl
service, reconciliation am
programs to overcome di
The AFSC carries out its
branches of the Religious
The AFSC has a vital inter
Friends' belief in the infin
and the equality of all hun
This testimony has led the
portion of its resources to
the causes of violence in s
imbalance of wealth, in e

Since the early 1950's
and Florida, the AFSC has
to gain for farmworkers a
can origin, greater control
conditions. In 1978, in c
Friends Service Commit
Mexico-U.S. Border Progr
lutions in the many proble
ship between Mexico and
cern of the AFSC/MFSC
AFSC to testify before the
gration and Refugee Polic
long-term look at the econ
ing adopted by Mexico wi
ment of the United States
favor rapid growth that ac
at the same time diverting
culture and destroying t
economies. In the resulti
root causes of Mexican m
Moreover, once the undo
the United States, their pr

ployers whose labor needs
net for the Mexican work
are for someone else.

In three years of pr
learned that a significant p
are here to stay. It has se
can migration have inclu
was not frequent a dec
undocumented workers fi
cial security. They consur
society and pay the sales t
undocumented residents
nation, pay taxes, but are
benefit of their labor.

This case involves th
tion for the children of u
Texas. AFSC experience
these children to receive a
entitled to it by the econor
deny it would violate the r
problem of enormous prop
nial of an education to th
persons in Texas would s
dent for discrimination a
would make justifiable
against people who by de
our society. It would dimi
this nation deals with tho
its midst.

2. United Church o
Ministries.

The United Church
is a recognized instrumen
Christ, a major Christian
6,000 congregations thro
Board is charged with th
the homeland mission of

which includes evan
development and im
social injustices. It
years through specia
of socially deprived
and migrant workers
Texas and other area
cern of the United C
tries' task force on im
er education of the c
lawsuit, is of extrem
dren, but to the coun
support.

3. The General
United Meth

The General Bo
United Methodist C
arm of the United M
history of advocacy f
the *Social Principles*
1980, the Board con
dren to an adequate

The Church has
cessity of education
insure that basic hu
the right to an educa
undocumented, perm
grants, are protected
This case is a prime
all children to an ad
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4. National Boa

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> doubtful that any child may reasonably be expected to succeed in life if he or she is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).

If the undocumented alien child is deprived of an education, that child will be forced to continue in the desperate situation that all too many undocumented aliens are in. The *Amici* have written this brief to draw the Court's attention to the lawlessness, economic exploitation and racism which the undocumented Mexican alien has been victim of for over 100 years.

SUMMARY OF THE ARGUMENT

Amici submit that it is clear that undocumented alien children are protected by the Equal Protection Clause of the Fourteenth Amendment. *Amici* support the arguments made by the Appellees that the wording of the Fourteenth Amendment, the case law and common sense support a holding that undocumented aliens are protected by the Equal Protection Clause.

The legislation challenged in this case excludes undocumented alien children from a free public education in Texas. This brief argues that the case law and policy underlying the case law require that this legislation be subjected to strict scrutiny.

The undocumented alien has no access to the political process. Traditionally, groups excluded from the political process have been accorded protection under a strict standard of review. Additionally, the vast majority of undocumented alien children in Texas are Mexican. As such they are part of an ethnic group whose citizen members have needed the highest protection of the courts. Persons of Mexican ancestry, whether citizens,

legal aliens or undocumented aliens, share physical, language and cultural characteristics that set them apart from the Anglo majority and make them identifiable as part of a distinct and insular minority. The combination of ethnicity and alienage have subjected this group to a discrimination and prejudice as pervasive and severe as that faced by blacks in this country. *Amici* set forth that history in this brief because it is within that context that this legislation must be reviewed. The legislation challenged in this case is an attempt by the State of Texas to impose further inequality on a group already overburdened and worn down by over a century of violence and inequality at the hands of the dominant society. Under these circumstances this Court must subject any additional discriminatory legislation to strict scrutiny.

Amici support in full all the arguments made by appellees in urging this Court to find Section 21.031 of the Texas Education Code constitutionally impermissible.

ARGUMENT

THIS CLASSIFICATION REQUIRES HEIGHTENED JUDICIAL SCRUTINY

A. A classification which denies access to education on the basis of alienage is suspect.

It was once settled law that differential treatment of blacks and whites was constitutionally permitted. *Plessy v. Ferguson*, 163 U.S. 537 (1896). Now a classification based on race or national origin is considered inherently "suspect". This Court requires "close judicial scrutiny" of a statute or governmental action based upon such a classification. The proponent of a measure creating "classifications constitutionally suspect" must establish an "overriding statutory purpose", *McLaughlin v. Florida*, 379 U.S. 184, 192 (1965), and bears "a very heavy burden of justification". *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

When discrimination against aliens has been examined by this Court, it has been declared "inherently suspect and . . . therefore subject to strict judicial scrutiny". *Graham v. Richardson*, 403 U.S. 365, 376 (1971). This conclusion was reached after the Court recognized in *Graham, supra* at 372, that

> Aliens as a class are a prime example of a "discrete and insular" minority (see *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, N.4, 82 L.Ed. 1234, 1241, 1242, 58 S. Ct. 778 (1938) for whom such heightened judicial solitude is appropriate. Accordingly, it was said in *Takahashi*, 334 U.S. at 420, 92 L.Ed at 1488, that "The power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."

Following *Graham, supra* this court has struck down discrimination against aliens in a variety of areas. *Sugarman v. Dougall*, 413 U.S. 634 (1973); *In re Griffiths*, 413 U.S. 717 (1973); *Examining Bd. of Eng'rs. v. Flores de Otero*, 426 U.S. 572 (1976); *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

The Court has determined in recent cases a limited exception to the *Graham* rule. *Ambach v. Norwick*, 99 S. Ct. 1589 (1979); *Foley v. Connelie*, 435 U.S. 291 (1978). In those instances in which a state excludes aliens from participation in the political community, the classification will be measured against the minimum equal protection standard, the rational basis test. The instant case does not raise at all the question of participation in the political community. The limited exception is not applicable.

B. Appellees and their parents comprise an insular and powerless minority which has been subjected to a history of discrimination as pervasive and severe as that directed against blacks. Therefore, strict judicial scrutiny is warranted.

When the discrimination involved in the i
case is examined in light of the policies underlyi
special treatment of suspect and semi-suspect clas
becomes evident that strict judicial scrutiny is
ranted. In *San Antonio Independent School Dist*
Rodriguez, 411 U.S. 1 (1973), the Supreme Cou
forth the traditional indicia of suspectness which g
court in evaluating whether a classification is to be
strict scrutiny:

> (T)he class is . . . saddled with such disabilit
> subjected to such a history of purposeful u
> treatment, or relegated to such a position of p
> powerlessness as to command extraordinary p
> tion from the majoritarian political process
> U.S. at 28.2.

The standards set forth above have been criticiz
broad and imprecise.[1] Nevertheless, indicia of su
ness have emerged from later cases in which the
has clearly limited the classes that are acc
heightened protection.

Quite specific criteria have emerged: that th
crimination against the class approach the sever
pervasiveness of the historic discrimination a
blacks,[2] that the class lack effective political power.
Court has plainly been guided by two central con
— notions of fairness informed by analogy to discri
tion against blacks[4] and a sense of the judicial obli

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1. See Wilkinson, "The Supreme Court, the Equal Pro
Clause, and the Three Faces of Constitutional Equality", 6
Rev. 945, 980 (1974) and *Sugarman v. Dougall*, 413 U.S. 6
(1973) (Rehnquist, J., Dissenting).

2. See for example, *Mathews v. Lucas*, 427 U.S. 495,
(1976); *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307,
(1976) and *Frontiero v. Richardson*, 411 U.S. 677 (1973).

3. *San Antonio v., Rodriguez, supra*.

4. See, e.g. *Frontiero v. Richardson*, 411 U.S. 677, 685
(plurality opinion) (comparing gender discrimination to disc
tion against blacks).

to protect politically handicapped groups from di
tages imposed by the majoritarian political p
Amici recognize that this Court has been reluctа
tablish "new" "suspect" classes or fundamental i
unless these criteria are met.

Amici suggest that any reluctance to est
suspect classification should give way in the inst
because the historic treatment of the undocu
Mexican alien is an unbroken history of exploit
governments and citizens alike which clearly m
criteria for a suspect classification.

Graham v. Richardson, *supra*, and the oth
cited as holding that alienage is a suspect class
concerned documented aliens. Their rationale is
appropriate for an analysis of a classification con
the undocumented alien.

The undocumented alien lives in constant f
he or she will be apprehended and, accordingly, c
seek even the most basic legal protectio
documented aliens, the undocumented alien
vote. Fearful of apprehension, the undocument
is unable even to speak up and point out his/h
lems to others who might be persuaded to vote in
behalf. Moreoever, in Texas and the Southwes
ally, Chicano citizens themselves lack effective
power. Historically, the undocumented alien h
exploited and discriminated against by individu
bers of the dominant society and by local and st
ernments. The extent of this discrimination aga
exploitation of Mexican undocumented aliens v
sented at the federal district court trial of this c

The record in the instant case also shows
overwhelming number of undocumented al
Texas and throughout the Southwest are of Mex
cestry. People of Mexican ancestry in this

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5. See e.g. *San Antonio v. Rodriquez*, supra. See
ment, "A Dual Standard for State Discrimination Against
Harvard L. Rev. 1516, 1524 (1979).

whether citizens, documented aliens or undo
aliens, have been subjected to a history of disc
that parallels that of blacks. The courts have
this historic discrimination. *Keyes v. School D*
1, Denver, 413 U.S. 189, (1973) *Cisneros*
Christi — ISD, 467 F.2d 142 (5th Circuit 197
nied, 413 U.S. 920 (1972). In *Keyes, supra,*
this Court stated

> But there is also much evidence that in
> west Hispanos and Negroes have a g
> things in common . . . In fact, the Dis
> itself recognized that "[o]ne of the things
> Hispano has in common with the Ne
> nomic and cultural deprivation and discri
> 313 F. Supp. at 69.

Below *Amici* set forth a synopsis of the hi
ploitation of the undocumented Mexican al
country. It will demonstrate a history of disc
which so closely rivals that of blacks in severi
vasiveness that, similarly, the need for str
scrutiny cannot be denied.

**1. Persons of Mexican ancestry are historic vi
cial myths and stereotypes used to justify
ferior status and exploitation.**

a) Mexicans as an inferior race.

Mexicans, like blacks, were early victi
American myths of racial "inferiority". Ster
cerning persons of Mexican ancestry, sim
developed about blacks in Texas and other
South, began in the early years of the nin
tury. According to Ralph Guzman, in an
lished in *The California Historical Quarte*
cial ideologies prevailing elsewhere in the U
found ready acceptance in the Southwest.

notes, prevailing views of race had a
with blacks as the reference population

Guzman has concluded that in Tex
ciety tended to equate Mexicans wit
transferring notions of racial inferiority
to the other. The dominant society attrib
strains that some Mexican people reflec
tury Louisiana and Texas slave runaw
were indeed descendants of black slave
date the Anglo tendency to equate al
Chicanos, especially the darker ones, w

In support of his bill to restrict M
tion in 1926, Box argued that Mexican i
"illiterate, unclean, peonized masses"
product of "a mixture of Mediterranean-
peasants with low grade Indians who di
tinction but submitted and multiplied a

As a result of this equating of Mexic
Anglos came to regard Mexicans as poss
traits ascribed to blacks:[9] undependabl
lazy, childlike and indolent. Mexican
scribed as drunks and criminals and of

Even the somewhat "positive" n
about blacks to support their subordi
blacks as a happy people, have been a
cans as well.[11]

Those who wanted unlimited immi
cans as workers emphasized the tempo
cility of the Mexican.

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6. R. Guzman, "The Function of Anglo-A
the Political Development of Chicanos", printed
Edited by F. Chris Garcia.

7. Guzman, *supra* Note 6 at 25.

8. U.S. Congress, Report of the Immigratio
Cong. 34d Sess., 1910—1911, 1:41.

9. G. Myrdal, *An American Dilemma* (194

10. Guzman, *supra* at 25-26.

11. See Myrdal, *supra* Note 9 at 108.

> All they want is a month's lal
> States, and that is enough to
> Mexico for six months . . . In ou
> not cause any trouble, unless the
> time and become Americanized;
> ile people. They can be imposed
> go out and make them do anyth

Denial of education was rational
ful to Mexicans.

> If they were miserable or unhapp
> right Mr. Educator, do your da
> Mexicans are a happy people, ha
> they don't want responsibility,
> float along, sing songs, make ci
> compelling Mexicans to go to sch
> prived them of anything, neithe
> happiness. By compelling them t
> crease their taste for things they
> they haven't the intellect, instinc
> quire.[13]

b) Fear of intermingling and "mo

In the 1920's nativist feeling fo
American fear that unlimited immi
ardize racial purity.

> Concern over the preservation
> Stock" was the subject of exte
> In the Southwest, the debate to
> that the region might be mon
> cans". Samuel J. Holmes, a pro

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12. Quoted in Acuna, *Occupied Amer*
Rep. Garner (Texas).

13. Paul Shuster Taylor, "Mexican La
Imperial Valley, Univ. of Calif. Publicatio
No. 1, p. 78-79.

the University of California,
like the African slaves of an e
a problem that might not end
warnings about the "danger
state a large mongrel popul
Texas.[14]

The fear continues. On Janu
Morning Star (Harlingen, Texas)
"Illegal Alien Swarm Mongrelizes

This Court is well aware of
the South the fear of inter-marria
Virginia, supra.

2. Lawlessness, violence and explo
ized the relation of the domin
Mexican ancestry.

Violence and intimidation w
and the segregated South. Subdu
force was inherent in the slav
owner, with the backing, if nee
and other whites was practicall
laws. This legally unrestrained vi
Reconstruction. Any white man
black, steal or destroy his propert
action and even take his life with
al. Violence resulted from accide
nothing at all.[15]

From the initial conquest of
present, Anglos have treated M
Americans in much the same wa
blacks. Anglos have always regar
quered people. The way in wh
fought the Mexican-American W

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14. Guzman, *supra* Note 6 at

15. G. Myrdal, "*An American Di*
and Modern Democracy", (1944) at 55

disdain with which blacks
cording to McWilliams in
Winfield Scott readily adn
"committed atrocities to n
American of Christian m
Murder, robbery and rape
the presence of tied-up m
common all along the Rio

Although the Treaty
ended the U.S. war with
ment for Mexicans living i
tion and violence which
continued. Up until 1870
frontier lawlessness that
Texas particularly. Betwe
can cattle raiders seemed
particularly devastating
large groups of Texans
burned houses and killed
intent of the Texans may
cattle killing, they comm
and murder.[17] McWillian
sum up the situation: "the
ment in the country borde
the killing of a Mexican i

In *The Great Plains*
plight of the Mexicans in

> Not only were the Me
> litical factions but the
> One law applied to th
> ous to the political l
> Americans. The Mexi
> persons but in their

16. McWilliams, North fr
17. McWilliams, *supra* N
18. McWilliams, *supra* N

> Mexican families foun
> if they did not lose in
> American lawyers. Th
> government that woul
> the higher classes di
> safeguard their proper

McWilliams reports th
one Texas area posted an
cans to leave the area wi
were a sport and could b
Anglos. A Mexican was kil
would not play the fiddle f

Between 1908 and 19
Mexicans in Texas were k
chiefly because they were
World's Work, George Marv

> . . . the killing of Mexica
> the last four years is a
> rangers have degenera
> ers. There is no penalty
> the border would ever
> shooting a Mexican . . .
> records makes you feel
> an open game season
> der.[23]

The number of killing
the Southwest from 1850 to
of lynchings of blacks for th

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19. Written by Walker Presc
supra Note 16 at 110.
20. McWilliams, *supra* Not
21. *Id.*
22. McWilliams, *supra* Not
23. Quoted in McWilliams,
24. W. Moquin and C. Van
the Mexican-Americans, p. 253

to McWilliams it w
the Twentieth Cer
Mexicans to depart
the Mexican comm
the problem for M

> . . . Guarantee
> equal rights
> States and of
> county after c
> proceedings o
> and forbidden
> instant death,
> tions.[26]

3. People of Mexic segregation an

Mexican Am
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vote because they
society imposed cl
tom. These restric

Mexican Ame
ment in the admi
Mexican-American
unlawful by the C
cans and Mexican
swimming pools,[3

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25. McWilliams,
26. Quoted in M
27. See Generall
Americans and the
(1970).
28. F. Chris Garc
"The Function of Ang
ment of Chicanos", N
29. *Hernandez v.*
30. *Terrel Wells*
824C Tex Civ. App 19

and theatres and c
gation of Mexican
never statutorily m
the 1970's. People
victims of restricti

School segre
Americans was dev
ning as early as
blacks, whites and
out Texas.[33] By 19
were established in
Texas.[34] There is
not allowed to at
grades.[35] It was no
of Mexicans and
school. When that
schools were estab

The separate s
There is evidence
"Mexican" schools

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to refuse service to a
such a practice was c
1140 (5th Cir. 1970)
Mexican Americans

31. One of the m
led to this formation
Forum was organized
Texas refused to have
decorated veteran bu
nally buried with full
tery. *San Angelo Sta*

32. Digest of Op
at 45C (1947).

33. See "Project
Texas Schools," 7 H
(1972).

34. *Id* at 314.

35. *Id* at 315.

36. *Id* at 315.

37. *Id* at 317.

Two cou
rate facilities
in 1930 tha
schools did r
less that seg
marily linqu
American pu
S.W. 2d 790
248 U.S. 58
separate sch
Delgado v.
(W.D. Texas
cision, the
that segrega
children was
to end this s

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gation. Desp
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can America
and Jim Cro
as that whic

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alike. The di
well as Mex
can governm
Texas durin
was in effec
officials pro
crimination.

38. O.M. S
1947" *Pacific H*

4. The undocumented alien as today's "slave".

At the Federal District Court trial of the instant case appellees presented substantial testimony and documentary evidence demonstrating the historic treatment of Mexican undocumented aliens throughout the Southwest and particularly Texas. It is clear that "the situation in South Texas for the undocumented person . . . resembles the early slavery in the United States".[39] This conclusion reached by the U.S. Commission on Civil Rights has been reiterated by a Congressional Committee as it reviewed contract labor.

> The foreign migrant is indentured to a particular farmer or farm association for the duration of his contract. One grower, speaking of the Mexican farm laborer program, said that 'we used to own slaves, now we rent them from the government'.[40]

In 1978, Leonel J. Castillo, then Commissioner of the Immigration and Naturalization Service (INS), gave a general description of what federal government officials have come to regard as a *domestic slave trade operating in the United States*:

> It's a very extensive network. We think that as many as one-fourth of all people coming across have someone helping them. They are very big operations. Some of them become a modern form of indentured servant. They pay a percentage of their salaries (to the smugglers) for years.[41]

There are many striking parallels between the once legal slavery of blacks and the modern day enslavement

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39. U.S. Commission on Civil Rights "Sin Papeles — The Undocumented in Texas" (1980) at 25.

40. Senate Subcommittee on Migratory Labor quote reported in Moquin, "A Documentary History of Mexican-Americans" p. 445.

41. S. Lewis, "Slave Trade Today", p. 7 (1979).

of undocumented aliens. The transportation of black slaves in crowded ships is a familiar image. The newest slaves are transported in vans, semi-trailer trucks and U-Haul trucks. Sometimes there is little or no food. Upwards of twenty or thirty adults are crammed into an area of sixty square feet with no air.[42]

Lewis paints a graphic picture of the horrors these undocumented aliens face, based on INS reports and an interview with an INS official.

> T. L. Giorgetti, who in 1978 was assistant director of investigations for the Chicago area INS, briefly explained the conditions of cross-country travel: "We have found instances where people have died on the trip due to dehydration. They are crammed into the vans and sometimes abandoned if the smuggler feels any heat."
>
> A few reports illustrate Giorgetti's account:
>
> February 1974: a routine check of a large truck in the Los Angeles area led to the arrest of twenty-four aliens who had been huddled together without food or water in the bay of the truck for two days. The driver was located and charged with suspicion of smuggling aliens.
>
> November 1976: twenty-seven Central Americans were driven from Los Angeles to Washington, D.C., in a metal cabin atop a pickup. They were jammed together on benches and had eaten only oranges and sandwiches on the sixty-hour cross-country trip. Officers reported that similar trips had been made from California to Boston and New York.
>
> July 1978: a Californian was arrested in Duel County, Nebraska, after twenty-six Mexicans were found jammed into his motor home — nineteen

42. Lewis, *supra* Note 41.

men, five women and two children. They were en route from Los Angeles to Chicago when they were stopped.

November 1978: A Californian was arrested in New Jersey after thirteen aliens were found in his Chevy van — ten men and three women. They were en route from California to New York. Arresting officer, Michael Trupkiewicz, a state trooper, recalled one case where twenty-five aliens had been crowded into a single van. "They transport them like cattle," he said.

January 1979: a Houston resident alien was charged in connection with the smuggling of twenty-seven undocumented Mexicans in one van.

February 1979: one man was arrested at a California rest stop when seven undocumented aliens were found in his car. Three were crammed in the trunk.

March 1979: after a tip from a Greyhound bus driver, the Border Patrol apprehended forty-three suspected undocumented aliens in a truck. The truck was driven by a seventeen-year-old.[43]

Similar accounts have been described to the Commission on Civil Rights.[44] Energetic news reporters have been able to develop evidence from interviews and reviews of court documents that hundreds of Mexican undocumented workers are made available by smugglers on order each month as farm laborers and as service workers.[45] One such reporter, *Elgin Illinois Courier*

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43. Lewis, *supra* Note 41 69-70.

44. U.S. Commission on Civil Rights, "Sin Papeles — The Undocumented in Texas" (1980) at 25.

45. See Washington, "Recruiter Aides, Indicted for Alien Smugglings," *Chicago Sun Times*, Feb. 28, 1979.

Caleca, Vic, "The Illegals of Elgin," *Elgin, (Ill.) Courier News*, Feb. 4, 1979.

— *News* reporter, Vic Caleca, began an investigati
the situation of undocumented aliens with an inte
with the wife of a convicted smuggler. He learned t
the five years before her husband's arrest in 197
had placed hundreds of undocumented aliens in
She also reported that she and her husband wou
paid out of deductions from the worker's pay fo
costs of transporting workers unable to pay in adva

A review of news articles concerning indictr
and arrests for smuggling indicates that Me
undocumented workers are supplied nationwid
smuggling rings which sell them in black marke
operations. These rings charge the aliens fees for t
portation that endangers their lives, deprive them o
if they can't pay, and subject them to intense ph
abuse.[47]

The cross-country smuggling operation is rev
through a review of such operations reported i
news media. After entering the United States
undocumented aliens are told to wait at a certain
— a drop house — for transportation north.

In February of 1979, fifty-seven undocum
aliens were discovered in a drop house raided b
INS. Drop houses are often points of assembl
groups of aliens arriving from the border.[48]

It is at drop house points that fees are ofte
lected. Nonpayment is punished by threats of de
tion or physical abuse. In one case, twenty-seven
were arrested after one alien escaped and brought
the local police. The twenty-seven aliens had
charged $225 each which they could not pay. As a

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46. Caleca, Vic, "The Illegals of Elgin," *Elgin, (Ill.)*
News, Feb. 4, 1979.

47. A list of news reports giving some idea of the natu
magnitude of the problem has been appended.

48. "57 Illegal Aliens Held", Oceanside, CA, *Oceanside*
Tribune, Feb. 9, 1979.

they were not given food by the smugglers for two
After two days, two men tried to escape. One
caught, beaten and returned. The other escaped
brought the sheriff back to the house. Six of the tw
seven were children, the youngest one was four
old. None of the aliens would identify the smuggle
cording to the Border Patrol officer involved in the
that is not unusual because undocumented alien
told that "if they say anything north of the border
they will be taken care of when they get south of th
der."[49]

John M. Crewdson, a reporter for the *New*
Times reviewed in 1980 the files of court cases an
reports and discovered numerous cases of forced
He uncovered allegations that a worker was cra
over night without food or water. He also learned
undocumented aliens are held in drop houses with
food or water and without sanitary facilities. Thos
can't pay the smugglers for their transportatio
threatened with being stripped and left in the des
the Southwest. Crewdson also learned that the wo
earnings are held while they work off indebtedne
food, transportation, housing and other charges.
workers attempt to leave, they are threatened with
ical harm or exposure to immigration officials as ill

Those who have studied the cases of forced
and physical abuse that have come to light have
cluded that some employers resort to threats, fo
debt peonage in order to insure that the worker sta
til the farmer receives a return on the money paid
the smuggler.[50]

The practices described by Crewdson are very
lar to the Black Code system of involuntary ser
which came about after the Civil War ended.

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49. D. Kelly, "27 Aliens Rescued, Arrested," *San Bern*
Sun, Feb. 13, 1979.

50. Crewdson, "Thousands of Aliens Held in Virtual Sla
U.S.", *New York Times*, October 19, 1980.

The tradition of human exploitation, l
ery, remained as a chief determinant of th
the South's economic life. Myrdal describe
having a pattern of common exploitation —
one is the oppressor of the one under hi
blacks were at the bottom and all others or
war, the old plantation system reestal
Elaborate legislation to protect the plan
against the tenants' was developed. Imme
ing the Civil War, eight Southern state
Black Codes.

> These Black Codes gave the Negro p
> little freedom. The colored man was
> only in many cases. The apprentice,
> other provisions of these statutes for
> into situations where he would l
> uncontrolled supervision of his forr
> other white men who were ready and
> ploit his labor.[51]

The Black Codes were abolished duri
tion. After reconstruction ended they mad
ance again in various forms. Debt peona
lished. Under this system a worker was
off his alleged indebtedness to his emplo

Vagrancy laws, another legacy of the
made it possible for employers to let the p
bor agents. Apprehended vagrants were fo
the chain gang, forced labor or employm
bums. The police and courts were used to
labor.[53]

The black peonage system of the
counterpart in the economic exploitatio
undocumented aliens today. INS offici
charged with practices such as releasin

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51. C. Mangum, Jr., *The Legal Status of the N*
52. *Id* at 164-70.
53. Myrdal, *supra*.

aliens for work at less than the regular wa
ing" some ranches in Border Patrol sea
ranchers to break strikes by inspecting un
plants.[54]

Many commentators have concluded
the patterns or undocumented migration
that in practice the Border Patrol functio
regulate the numbers of undocumented
country rather than to apprehend and ex

The INS has reported that employers
cheat workers of the wages or to rob them
for rent. Unscrupulous employers profit fr
able status of undocumented aliens by cal
migration and Naturalization Service t
payday to raid their shops. The INS ar
pected illegal aliens without leaving them
their wages. The employer thus saves pa
more low wages.[56] Similarly, landlords h
their profits by taking a full month's
undocumented alien and then calling in
practice allows them to rent the same apa
times every month.[57]

The American Friends Service Co
ducted field research in 1978 to prepare
the Judiciary Committee of the U.S. Sen
sidering immigration legislation. "All th
(private) organizations who have contact
mented workers have heard complaints t
often pay them less than resident workers
ductions they don't understand and so
them away without pay under threat of
over to the INS.[58]

---

54. Lewis, *supra* at 98-101.

55. J. Samora, *Los Mojados: The Wetback St*

56. Lewis, *supra* at 152.

57. *Id* at 107.

58. Material concerning Immigration Propos
can Friends Service Committee for the Judiciary
Senate, May 1978.

Undocumented aliens not only
ploitation at the hands of private citi
they are also denied return on their
sound evidence that undocumente
being a drain on public services, c
enues needed for such services for
The House Select Committee on P
viewed studies and heard testimony
ported in 1978:

> Despite popular belief, illegal i
> pear to be a heavy burden on G
> vice programs. Undocumente
> more likely to pay taxes than
> programs.
>
> . . . the most current research
> cerned with illegal migration.
> reflect the frustration officials
> creasing social service costs a
> limit these costs.[59]

A North and Houston study m
partment reports: "Information o
hended indicated that 73% paid f
77% paid social security, and 44%
hospitalization insurance. In contra
ceived welfare payments, 1% obtai
participated in U.S.-funded job tra
4% collected unemployment insur
the illegal aliens received free me

Amici suggest that undocum
pate and contribute to the econom
way, one in which their labor serve
of the economic structure and in w
nied adequate compensation and s
he or she has contributed.

---

59. Ehrnlich, et. al, *The Golden Doo
and the United States", (1979) p. 343.

60. Newsletter, Intercultural Devel
ation, January 1978.

The changes in the conditions
worker all seem to be for the worse
become more sophisticated and m
ployer who pays more to the sm
ruthless, even resorting to violen
While clearly the situation is not o
true slave system, the alien's fear
portation makes the prosecution o
sible.[61]

CONCLUSIO

State-enforced discrimination
aliens is virtually identical to raci
least three significant ways:

> (1) each reflects a grou
> imputed characteristics w
> imaginery, are nonetheless in
> dividual members of the grou
>
> (2) each provides gover
> for the opinion privately held
> nant group that, due to the
> these characteristics, each m
> nate group is inherently infe
>
> (3) proceeding from the
> stereotypes are accurate, eac
> and perpetuate the existence
> acteristic by requiring every
> variety of rules, all of which
> one group is in fact inferior t

The falsity of certain racial st
to blacks, has become widely reco
The record in the instant case an
Section 21.031 of the Texas Ed
acted to exclude undocumented a
public education. The state has
cept that this statute is related to

61. Crewdson, *supra* Note 50.

jective: conserving to citiz
the state's education resou
onstrates that no study of t
children on those resources
was enacted and no study
contribution to the school f
was attempted. The eviden
undocumented aliens con
the school fund as well as o
take back. In short, the
shown the falsity of a key
nant society regarding th
group takes but does not
undocumented child — is
subjection to pervasive re
types tends to influence, a
themselves. This we learne
case the age-old stereotype
literate, uninterested in edu
may become reality for the
from the most significant
break the cycle of poverty

Mexican immigrants
violence and exploitation
as severe and pervasive as
legislation which would h
the undocumented Mexica
because it falls on a group
a "suspect" class. Amici u
pellees are entitled to a fre

1972 Associated Press, "
Ring," *The Washing*

1973 Bernstein, Harry, "
Cards Seized at L.
Times, Jan. 13, 197

Charlton, Linda, "A
Coast," *The New Yo*

Keen, Harold and
Year Mexican Alien
Angeles Times, July

1974 Holles, Everett R., "
Alien-Smuggling Ri
Dec. 24, 1974

Rawitch, Robert E.,
Smuggling Trial," *L*
1974

United Press Inter
Truck, *The New Yo*

1976 Kendall, John, "Bilk
L.A. Told," *Los Ang*

Lewis, Alfred E. a
Travel Here in Smal
ington Post, Nov. 2

1977 Maxwell, Evan, "L
Buying and Sellin
Times, Feb. 22, 197

1978 "Alien Smuggling C
dent," Chula Vista,

"California Hell for
Platte, NE *Telegra*

"Fatal Alien
ments," *San*

"Illegal Tra
Louis Post-D

"Los Angele
Transporting
Oct. 22, 197

"Man Guilty
Union, Dec.

"Man Held o
Conspiracy,"

"Police Stop
Oregon, *Gaz*

"Smuggling,

"Woman is
Fort Worth S

"U.S.-Mexic
Racket," No
1978

Mark, Susa
Ends on Rte
1, 1978

Mintz, Bill,
Alien Labor
10, 1978

Morrison, Pa
— Aliens He
Angeles Tim

Morrow, Th
'Coyote' to Q
vocate, Aug.

Mintha, Don,
of Racket in
Tribune, Nov

Norton, Clark
wide Busines
vice, June 12

Smith, Doug,
Fable," *Los A*

1979 "Alien Smug
CA, *Star New*

"Alleged Smu
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"Eight Indict
Up," *San Die*

"Four Arraign
Gabriel Valley

"4 Deny Smu
Examiner, Fe

"Five Suspec
cent," Covina
Feb. 8, 1979

"Illegal Alien
Herald-Exam

"Illegal Aliens
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"Man Enters
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MOTION FILED

JUL 30 1981

No. 80-1934

IN THE

e Court of the United States

OCTOBER TERM, 1980

LIEN CHILDREN EDUCATION LITIGATION
STATE OF TEXAS AND TEXAS
DUCATION AGENCY *Appellants,*

v.

ITED STATES *Intervenor-Appellee.*

Appeal From The United States Court Of Appeals For The Fifth Circuit

ON OF THE NATIONAL SCHOOL OS ASSOCIATION TO FILE BRIEF and BRIEF AS AMICUS CURIAE SUPPORT OF APPELLANT

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ON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

IN THE

of the United States

ER TERM, 1980

o. 80-1934

REN EDUCATION LITIGATION
TEXAS AND TEXAS
AGENCY *Appellants,*
v.
s *Intervenor-Appellee.*

n The United States Court
For The Fifth Circuit

ATIONAL SCHOOL BOARDS ON TO FILE BRIEF ICUS CURIAE

l Boards Association moves this icipate as *Amicus curiae* herein, g the attached brief.

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United States
1980

ATION LITIGATION
TEXAS
ppellants,

r-Appellee.

States Court
Circuit

SCHOOL BOARDS
OF MOTION FOR
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ssociation has moved
amicus curiae herein
brief.

s Association is a
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school boards having
more than ninety-five
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ot only in states like
undocumented alien
beyond the confines
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ool children such as
nts who send their
ee public education

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extend to all
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Whether
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Amicus will go beyo
hopes of providing the C
the precedent set in th
districts in other states w

Classes Of Children

Amicus has broade
decision below because i
noted. Although the c
constitutionality of a
documented and undocu
purpose of state fu
classifications which wou
decision were to stand.
the state of Florida this
(which was vetoed by
reasons) which would hav
tuition fee with certain e

The rationale of the
which may be unique to
other states as well. Wea
are sending their children
in Florida in order to ta
education in that state.
the children return to th
some undocumented alie
remain permanently aft
although the lower court
10% of those students. C
Florida seeks to charge
category and yet, their c
no less than those of the

Another classificati
residence and domicile

parents, like in the South America
take advantage of the educat
neighboring state. As long as the
state, according to the precedent o
district to which the child is sent co
or otherwise treat the child any
children of residents of the state.

States are forced to take unpo
those challenged here because the C
branch are failing in their duty.
caught up in a natural humanit
children who are the subject of
their plight is sad. However, th
system cannot cure all wrongs and
the totality of the issue. The
alleviate the problem is not by a
Constitutional protections which
burden of a solution on school dis
this problem is one for Congress,
the Department of State.

The Role Of The Federal

Civil Rights Protec

Title VI of the Civil Rights A
2000d, prohibits any federally f
from discriminating on the bas
national origin. In 1974 this court,
Nichols, 414 U.S. 563 (1974), aff
of Health, Education and Welf
imposed "affirmative" obligation
with significant numbers of lim
children in their schools. Thus,
obligated to, at the least, pro
training to these children.

Most of the undocumented alien children i
and in other states do not speak English. Thus, r
are school districts required to provide t
undocumented alien children the same educati
provide to other children in the district — th
provide more services. The unpublished
Remedies", formulated by the Department of
Education and Welfare in 1975, are now being u
guideline by the Department of Education
enforcement efforts under Title VI. The remedies
all limited English speaking children to be p
training in both English and their native langua

In the last Administration there was a
controversy over a proposed rule, 45 Fed. Reg
(Aug. 5, 1980), which was promulgated
Department of Education (withdrawn on Febr
1980 by Secretary Terrel Bell), with educators
that the expense of a full scale "transitional bil
program is prohibitive in cost and not educa
sound in a great number of situations. Now
districts are told that the class of children to who
services must be provided has been broadened to
children illegally residing in this country.

Undocumented alien children would also be
under this decision, to other special services
those required to be provided to handicapped
under Section 504 of the Rehabilitation Act of 1
U.S.C. 701 *et seq.* Nothing, apparently, would
the parents of a severely handicapped child from
to the United States and demanding a fu
residential program, which can run in excess of
per year for that child See *Hines* v. *Pitt County*
of Education, 497 F.Supp. 403 (E.D.N.C. 1980
alone would be incentive to cross our borders il

Privacy Act

The State of California, confronted, like Texas, with a great influx of undocumented alien children enrolling in its public schools, sought to deal with the problem by assisting the United States Immigration Service in its efforts to administer the federal immigration laws. The California state legislature passed a statute which required the Board of Supervisors of each county in the state to forward a list of names of non-citizen children without immigration status, to the United States Immigration Service, Calif. Educ. Code Section 6927. Subsequently, a decision in the case of *Maria de Lourdes P.* v. *Riles*, (case #C-121905), held that the California statute violated the Family Educational Rights Privacy Act of 1974, 20 U.S.C. 1232g(b)(1)(E). In response to this decision, Wilson Riles, California Superintendent of Public Instruction, issued a directive to local school districts prohibiting them from releasing the names as required in the California statute.

Thus, California is on the horns of a dilemma. On the one hand, they are told by federal courts that they must educate all children within their borders, even though the presence of the children is in violation of federal law. On the other hand, federal statutes prevent them from assisting the United States government in enforcing the immigration laws.

Federal Funding Of Education

Last year Congress passed the Refugee Act of 1980, 8 U.S.C. 1522(d)(1), which provides a limited amount of funding to school districts with large numbers of refugee children who have suddenly come into their districts. The act is very careful, however, to spell out which

children are eligible in the district to receive funding. Children who are fleeing their country for economic, educational or other reasons not related to the political climate in their country are not "refugees" under the Act. 8 U.S.C. Section 1101(a)(42). Immigrants from Viet Nam or Cuba are covered. Immigrants from Mexico, much of South America and Canada are not covered.

The United States Congress appears to have a mindset that if a child is here illegally the federal government will not provide any funding for that child for education or other services. But while the federal government is failing in its duty to either enforce the immigration laws or to deal with the problem of undocumented aliens through treaties or other agreements with their country of origin, state and local governments are being called upon to support these undocumented aliens.

Even under the Refugee Act of 1980, the Congress has appropriated monies which are hopelessly inadequate to cure the problem. For example, Dade County, Florida estimates that for school year 1980-1981, their Cuban/Haitian Entrant Program will increase the cost of educating children in the state by more than $3.4 million for direct supplementary instruction. This figure does not include instructional support, new buildings, school maintenance etc.

Public education is also getting hit on another front. Both Houses of Congress have passed legislation which would result in cuts in authorized ceilings over the next three years for the education of disadvantaged children and other important programs which could be used to educate undocumented aliens. (H.R. 3982, 97th Cong., 1st Sess.(1981); S. 1377, 97th Cong., 1st Sess.(1981). The legislation is now in the House-Senate Conference

This would result in "level" funding over
- that is, the dollar amount funded each year
in the same, probably resulting in a cut-back
of services. Given the President's budget
mitted to Congress in March of 1981, the
opriation picture for education is looking
bleak. The Administration proposal would
FY 1981 from the budget for education
om this base of 75% of the FY 1981 level,
would be given only a 7% increase for FY
eir most generous days, Congress has never
d sums at their fully authorized level. Even if
ess increases appropriations from that
ed by the President, the appropriation levels
ean devastating cuts in major educational

dditional programs which are of special
schools in attempting to meet the needs of
ed alien children are also slated for cuts.
al would cut the school lunch program by
5 billion. The House is proposing a 50% cut
for bilingual education. In the meantime,
rts continue to tell schools that they must
vices to thousands of additional children
s far exceed these of the average child.

CONCLUSION

ational School Boards Association, like the
exas and its school districts, has a primary
moting and improving the public education
is country. It is indeed disconcerting to be in
of arguing against the education interests of
dren such as those represented by the
erein. However, it is inherent in the nature of
system that hard decisions must be made as
s and priorities. Schools cannot right all the
society.

Cases like the one at bar must be decided on the basis of clear Constitutional principles. There exists no principle which prohibits a state from making a decision, based on sound fiscal rationale, that the state cannot take on the burden of educating the citizens of another country. Whether or not states are justified in charging undocumented alien children tuition is only the tip of the iceberg. There are several other closely intertwined issues which must be faced by this country: whether and how to enforce the immigration laws; whether a diplomatic solution to the problem of undocumented aliens should be sought; and what services, if any, should be provided to aliens entering the country illegally. The problem is national in scope and its solution involves policy decisions which must be made by the United States Congress and the President and his advisors. They are not decisions for the courts.

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iae, National School Boards Association,
rved upon all parties by placing same in the
s mail, addressed to:

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